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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. VIII.

SAN FRANCISCO:
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AMERICAN STATE REPORTS.

VOL. VIII.

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AMERICAN STATE REPORTS.
VOL. VIII

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

BIER v. GORRELL.

[80 WEST VIRGINIA, 95.]

PUBLIC OFFICERS. — DE JURE OFFICER, who has been kept out of his office by the intrusion of another person, may recover, in an action on the case against such intruder, all salary, lawful perquisites, fees, and emoluments which he would have received if he had exercised the office, less the necessary expenses of earning them.

PUBLIC OFFICERS — STATUTE OF LIMITATIONS. — OFFICER DE JURE, who has been kept out of his office by an intruder, may recover, in an action on the case against the latter, all profits received from the office within five years prior to the commencement of the action, but not those received before that time.

John A. Hutchinson and D. D. Johnson, for the plaintiff in error.

J. B. Jackson and George Loomis, for the defendant in error.

SNYDER, J. Action of trespass on the case, commenced April 30, 1884, in the circuit court of Pleasants County, by W. E. Bier against Oliver Gorrell. In September, 1877, the defendant was duly appointed and qualified as sheriff of Pleasants County, to fill the vacancy in said office until the election and qualification of a sheriff to fill said office for the unexpired term, which ended December 31, 1880. At the general election held October 8, 1878, the plaintiff was elected to fill said unexpired term, and on October 21, 1878, he qualified by taking the oath and filing the bond required by law. The defendant continued to hold and exercise the duties of said office, and by legal proceedings contested the right of the plaintiff to hold the office. In December, 1878, the county

court reappointed the defendant to fill the office for the unexpired term. In the contest, the county court decided that the plaintiff, Bier, was ineligible, and his election void. The circuit court reversed the said judgment of the county court, and decided that Bier was entitled to the office. Upon a writ of error, taken by Gorrell, this court, on July 9, 1879, affirmed the said judgment of the circuit court: *Gorrell v. Bier*, 15 W. Va. 311. On August 2, 1879, Gorrell surrendered the office to the plaintiff, Bier. The present action is brought to recover from the defendant the damages sustained by the plaintiff by reason of the defendant's withholding from the plaintiff the said office during the period from October 8, 1878, to August 2, 1879. There was a verdict and judgment in the circuit court in favor of the plaintiff for \$466.91, and the defendant obtained this writ of error.

1. There was a general demurrer to the declaration, which the court overruled, and this is the first error assigned. The declaration is irregular, and quite informal; so much so that it is difficult to determine whether the pleader intended it for one count only in case, or for two counts,—one in case and the other in *assumpsit*. In its first paragraph it avers that the defendant illegally and fraudulently exercised the duties of the office, and received the fees, commissions, and perquisites thereof, to the amount of two thousand dollars, which of right belonged to the plaintiff, and which, on demand, he refused to pay to the plaintiff; and in the second paragraph it avers that the plaintiff demanded of the defendant to desist from the exercise of the duties of the office, and to turn over to him the books and papers belonging thereto; that the defendant failed to do so, but, well knowing the premises, he continued to exclude the plaintiff from said office, and to exercise the duties, and to appropriate to himself the fees, commissions, and perquisites thereof, to the amount of two thousand dollars; whereby the plaintiff has sustained damages, etc.

Taking the whole declaration together, I think it must be regarded as consisting of but a single count in case. Neither of its paragraphs avers any promise on the part of the defendant. Such an averment is essential in *assumpsit*. If the declaration did, in fact, contain two counts, one in case and the other in *assumpsit*, it would be clearly bad, because actions founded on tort can never be joined with actions on contracts: 4 Rob. Pr. 875. It seems to me, however, that there is no such misjoinder in this case.

The question then arises, Does this declaration state a legal cause of action? It seems to be well settled that a *de jure* officer, who has been kept out of his office by the intrusion of another person, may by action recover from such person for the injury sustained by him, and that in such action the lawful perquisites which the plaintiff would have received if he had exercised the office are the proper measure of his recovery. The common-law form of action in such cases was on the case of the assize: *Boyter v. Dodsworth*, 6 Term Rep. 681; *Auditors etc. v. Benoit*, 20 Mich. 176; 4 Am. Rep. 382.

It seems to be a principle of natural justice, as well as law, that where one person has injured another, or received the compensation which in equity and good conscience belongs to another, he may be required by action to account to such other for the injury done him. In like manner will an intruder in office be required to account to the legal officer for injury done by the intrusion. The legal right to an office confers the right to receive and appropriate the fees and perquisites legally incident thereto. When such officer performs the duties of his office, he may demand and receive the compensation therefor allowed by law, and he is as fully entitled to such compensation as he would be in any other case entitled to pay for skill and labor done for another at his request. The legal fees and emoluments of an office are a part thereof, and belong to the rightful incumbent; and where a person receives such fees and emoluments on the pretense of title to the office, the *de jure* officer may recover the profits of the office from him by an action of *assumpsit* for money had and received to his use: *Arris v. Stukely*, 2 Mod. 260; *Mayfield v. Moore*, 53 Ill. 428; 5 Am. Rep. 52.

Where the office is one with a fixed salary attached to it, the officer will be entitled to recover the entire official salary, without any deduction for the services of the incumbent, or for what he may have earned himself while ousted: *People v. Miller*, 24 Mich. 458; 9 Am. Rep. 131; *Comstock v. Grand Rapids*, 40 Mich. 397; *Dolan v. Mayor*, 68 N. Y. 274.

Such, however, is not the case when the compensation affixed to the office is made to depend upon fees for services rendered to the public and to individuals. In such case the officer is entitled to recover from an incumbent, acting under an apparent claim of title, only the profits of the office; that is, the fees and perquisites, less the necessary expenses of

earning them: *Mayfield v. Moore*, 53 Ill. 428; 5 Am. Rep. 52; Sedgwick on Damages, 659, note.

The form of action in most of the cases I have been able to find has been *assumpsit* for money had and received to the use of the plaintiff; but inasmuch as the original action in cases of this kind was on the case of assize, which was an action in tort, I cannot see why an action on the case as well as *assumpsit* does not now lie. In *Boyter v. Dodsworth*, 6 Term Rep. 683, Lord Kenyon, C. J., says: "If there had been certain fees annexed to the discharge of certain duties belonging to this office, and the defendant had received them, an assize would have lain; and the action for money had and received to recover fees has always been considered as being substituted in the place of an assize." In many cases *assumpsit* and case are convertible actions. Where there has been tortious taking and conversion of goods, the owner may bring either trespass for the taking, or he may waive the tort and bring *assumpsit* for their value: *Maloney v. Barr*, 27 W. Va. 381. And under our statute case may be maintained in any action where trespass would lie: Code, sec. 8, c. 103. It seems to me, therefore, that the plaintiff's declaration is, in substance, sufficient, and that the demurrer thereto was rightly overruled.

2. The next assignment of error that we deem it necessary to consider is in relation to the statute of limitations. The defendant, having pleaded the statute, asked that the court instruct the jury that it was incumbent upon the plaintiff to satisfy the jury that the defendant received and collected the fees and emoluments of office sought to be recovered, within five years before the time this action was commenced. The court gave the instruction, with this addition: "But the right of action accrued to the plaintiff on July 9, 1879, the time when the judgment of the supreme court was rendered in the case referred to in the evidence." The defendant excepted to this modification of the instruction, and now insists that it was erroneous. In an action of *assumpsit* upon a running account of separate items, gotten at different dates, the rule is well settled that the cause of action accrues upon each item at the time it was gotten, and the statute begins to run as to such item from that time; and if action is not brought within the statutory limit, such item will be barred, although other items of the account may be within the statutory period at the time of action brought and not so barred. The same general rule applies in cases of tort. Each separate trespass or wrongful

act constitutes a cause of action, unless it be an act which does not of itself cause an injury or damage. As, for instance, if one dig a pit in the highway, all the world cannot sue him, but only he who falls into it. Therefore the person who falls into it has no cause of action until he gets hurt by it, although the pit was dug long before. But in all cases where the wrongful act of itself causes an injury or loss, the cause of action as to that injury or loss accrues at once, and each successive injury or loss, although resulting from the same wrong or act of the defendant, will constitute a separate cause of action; and the statute will begin to run, in every instance, from the time the right of action accrued for each separate injury or loss: 1 Rob. (New) Pr. 478, 479, and cases cited.

In the case at bar the cause of action accrued to the plaintiff at the time the defendant unlawfully excluded him from his office, which was October 21, 1878, the date at which he qualified and filed his bond as sheriff of the county; and not July 9, 1879, the time the contest for the office was finally judicially determined by the supreme court of appeals. The defendant was appointed to hold the office until his successor was qualified, and as soon as this was done his right to hold the office ceased, and the right of the plaintiff to hold it became complete. The title of the plaintiff was as complete then as it ever was, and no subsequent act lent the least force to his right to the office. The decision of the supreme court was simply the judicial determination of a fact. It did not create a fact or right, and was therefore no more potent to confer the right to the office than was the decision of the circuit court, or that of the county court. The court, on the evidence, declared the title, but did not confer it. The plaintiff was entitled to the office, and its fees and emoluments, from the time of his qualification, and the defendant was liable to account to him for them from that date until he ceased to act and receive the fees and perquisites of the office: *Mayfield v. Moore*, 53 Ill. 428; 5 Am. Rep. 55. Each day the defendant usurped the office, and each fee or perquisite received by him constituted a cause of action. Hence it follows that whatever profits the defendant received from the office within five years from the commencement of this action the plaintiff is entitled to recover. This conclusion makes it apparent that the circuit court erred in modifying the instruction as it did. The points already decided obviate the question raised by the other assignments of error, and render it unnecessary to pass upon them.

For the error aforesaid, the judgment of the circuit court is reversed, the verdict of the jury set aside, and the case remanded for a new trial.

OFFICER DE JURE MAY RECOVER from an intruder the salary, fees, and emoluments which belong to the office, less the necessary expense of earning them: *Mayfield v. Moore*, 53 Ill. 428; 5 Am. Rep. 52; *People v. Miller*, 24 Mich. 458; 9 Am. Rep. 131; *Nichols v. MacLean*, 101 N. Y. 526; 54 Am. Rep. 730; *Kessel v. Zeiser*, 102 N. Y. 114; 55 Am. Rep. 769; *Glascock v. Lyons*, 20 Ind. 1; 83 Am. Dec. 299, note 303. But sureties on the official bond of a sheriff *de facto* are not liable under the statutes of Tennessee to the sheriff *de jure*, upon his recovery of the office, for fees, salary, or other emoluments of the office, which were received by the intruder while wrongfully exercising the functions of the office: *Curry v. Wright*, 86 Tenn. 636.

HUDKINS v. WARD.

[80 WEST VIRGINIA, 204.]

EQUITY — MARSHALING ASSETS — SUBROGATION. — Creditor who has two funds open to him, while another creditor has but one, cannot take the latter fund without placing that one exclusively within his reach at the disposal of the creditor whom he has deprived of the means of payment. If he refuses or neglects to fulfill this duty, equity will decree subrogation.

EQUITY — MARSHALING ASSETS. — Rule that when a creditor has a lien on two funds, and another creditor has a subsequent lien on one of the funds only, equity will require the former to resort, in the first instance, to the fund upon which the subsequent creditor has no lien, for the satisfaction of his debt, is subject to the qualifications that such course must appear to be necessary for the payment and satisfaction of both debts, and must not operate to prejudice the rights of the first creditor to the double fund. Neither must there be any reasonable doubt of the sufficiency of the one fund to satisfy the debt of the first creditor.

EQUITY — MARSHALING ASSETS — SUBROGATION. — Where creditor can resort to two funds for payment, while another creditor can resort to but one of them, the first creditor cannot be delayed in enforcing his debt, but may resort to the fund most easily accessible, and the other creditor who has been prevented from resorting to that fund must take his place as to the other.

J. Hop. Woods, for the appellants.

T. A. Bradford, for the appellee.

JOHNSON, President. In 1881, R. E. Hudkins and D. C. Hudkins obtained from the judge of the circuit court of Barbour County an injunction restraining the collection of a judgment. By the bill it appears that Simon Ward, who sued for

the use of Crim and Woodford, recovered on the twenty-eighth day of October, 1881, in the circuit court of said county, against the said Hudkins and Brother, a judgment for \$1,575.31, and costs; that long before that time said Ward was indebted to said Hudkins and Brother in the sum of \$1,055, for which he had executed his note, dated the fourteenth day of January, 1881; that this note was executed to R. E. Hudkins alone, but in fact the debt was due to the plaintiffs jointly. The plaintiffs say that they did not attempt to set-off said note in the action at law, because it was not then due. The bill further charges that Ward is insolvent and has left the state of West Virginia. The bill tenders the residue of the money due on the said judgment after applying the \$1,055 as a set-off against it, and prays that said set-off may be made, and for an injunction against said judgment and for general relief.

J. N. B. Crim and A. M. Woodford filed their joint answer to the bill, averring the recovery of the judgment in the name of Ward for their use, and admitting the insolvency of the defendant, and that he had left the state, but denying that the \$1,055 was due to the plaintiffs jointly. They also aver that on the 3d of March, 1881, the said Ward executed a deed to Luther C. Elliot, trustee, conveying 750 acres of valuable land, worth \$18,000 or \$20,000, to secure to R. E. Hudkins the payment of the \$1,055, which he desires set off against their judgment; that said deed was immediately recorded, and is an ample security for the said plaintiffs' demand against said Ward. The answer also avers that after the execution of the deed of trust Ward assigned his claim to said Crim and Woodford, upon which the judgment against Hudkins and Brother was recovered; that after the execution of said trust the said Ward executed other deeds of trust and confessed large judgments to secure other debts, and thereby further encumbered his said real estate to the amount of not less than \$15,000, and left the state, so that unless the respondents can collect their said judgment against the plaintiffs or be subrogated to their rights in the said trust deed, they will be compelled to lose the \$1,055 and interest. They therefore claim that the plaintiffs have no right to have the said \$1,055 and interest set off against their judgment; that plaintiffs are amply secured as to that amount by the trust deed; that they have no right to abandon that security at the expense of the respondents; that they are entitled at least to be subrogated to the rights of

the plaintiffs in the deed of trust, which they deem an ample security. They pray that the injunction be dissolved, or if the plaintiffs are entitled to the set-off, that they may be subrogated to the rights of the plaintiffs in said deed of trust. The deed of trust is exhibited with the answer.

The deposition of R. E. Hudkins was taken, in which he proves that, although the \$1,055 note was executed to him alone, yet the debt was due to his brother and himself jointly. There was a general replication to the answer of the defendants, and no depositions were taken for the defendants.

On the twenty-third day of July, 1885, the case was heard, and the court permitted the set-off to be made, and, as the residue had been paid to the defendants Woodford and Crim, perpetually enjoined the judgment and decreed costs against the defendants, but did not subrogate the said defendants to the rights of the plaintiffs in the deed of trust. From this decree Crim and Woodford appealed.

The aim of a court of equity as regards the payment of debts is equality,—that the assets shall be so distributed as to satisfy all the creditors; and a creditor will not be allowed arbitrarily to defeat this rule by throwing the whole burden on a particular fund. This results from the dictates of natural justice, that, where there is enough for all, it shall be so distributed as to give to each his due. A creditor, who has two funds open to him, while another creditor has but one, obviously should not take the latter fund without placing the fund, which is exclusively within his reach, at the disposal of the creditor, whom he has deprived of the means of payment. And if he neglects or refuses to fulfill this duty, it may be enforced by a decree of subrogation: 2 Lead. Cas. Eq. 1255, note. The principle on which a court of equity proceeds in marshaling assets is, that a creditor having a choice of two funds ought to exercise his right of election in such a manner as not to injure other creditors, who can resort to only one of these funds. But if, contrary to equity, he should so exercise his legal rights as to exhaust the fund to which alone other creditors can resort, then these other creditors will be placed by a court of equity in his situation, so far as he has applied their funds to the satisfaction of his claim: Marshall, C. J., in *Alston v. Munford*, 1 Brock. 266.

In *Calle v. Meem*, 8 Gratt. 496, the testator had given a bond to indemnify an indorser, and the holder of the note was allowed to stand in the place of the indorser, and be paid as a

creditor by specialty out of the real assets, although the indorser had not been compelled to pay the note. See also *York & J. Steamboat Co. v. Jersey Co.*, 1 Hopk. Ch. 460; *Hawley v. Mancius*, 7 Johns. Ch. 174; *Evertson v. Booth*, 19 Johns. 485; *Ramsey's Appeal*, 2 Watts, 228; 27 Am. Dec. 301.

In *Brinkerhof v. Marvin*, 5 Johns. Ch. 321, the bill stated that in July, 1819, J. and Z. Taylor, of Saratoga, being largely indebted to the plaintiff for goods sold to them, executed a bond to the plaintiff for the amount due, with warrant of attorney to confess judgment thereon; that judgment was entered up in the supreme court on the bond the 27th of November, 1819; that on the 3d of January, 1820, the defendants, W. J. and A. Marvin, entered up a judgment against J. Taylor by confession, on filing special bail, without a writ or declaration or a *cognovit actionem*, for \$5,755.60 collateral security for indorsements then made and thereafter to be made for J. and Z. T., and for money then due or thereafter to be due; that the defendants had at that time indorsed a note given to J. and Z. T. for goods previously purchased; that on the 7th of April, 1820, the defendants entered up another judgment against Z. T. for the like sum of \$5,755.60, on filing a special bail and a *cognovit actionem* in like manner, which was given as security for the purposes above mentioned for partnership debts of J. and Z. T.; that the defendants issued execution on these judgments in the counties of New York, Washington, and Saratoga, in which personal property of J. and Z. T. was taken and sold. The bill charged that the defendants colluded with J. and Z. T. to defeat the just claims of the plaintiffs; that the purchase of goods was colorable, or for an inadequate amount, and that J. and Z. T. were never indebted to the defendants in the full sum directed to be levied on the executions so issued, and that the defendants held personal securities of J. and Z. T. to a large amount; that the defendants have caused the real estate of J. and Z. T. to be advertised for sale under their judgments and executions; that the defendants insist on the priority of the lien of their judgments under an order of the supreme court directing said judgments to be first satisfied, etc. The bill prayed for an injunction and a discovery. The defendants answered the bill, and among other defenses relied on is this, that the defendants had offered to assign their judgments to the plaintiffs, and to put them completely in their place, on being paid

the principal, interest, and costs due to them, which offer was refused, but which they now repeated.

The chancellor said: "The defendants, in their answer, offer to give the plaintiffs entire substitution, which would apply as well to that bond and mortgage as to the judgment. This is all that the plaintiffs can reasonably ask for; and it would not be equitable to detain the defendants from their remedy under the judgment until they had engaged in and concluded a litigation as to a personal security of such doubtful rights and uncertain results. The defendants have, therefore, shown themselves to be creditors of J. and Z. T. with equal equity to the plaintiffs; and they have a legal preference, by the decision of the supreme court, of which they ought not and cannot, upon safe and sound principles, be deprived by this court. I shall accordingly grant the motion to dissolve the injunction, unless the plaintiff shall, in twenty days, elect to pay to the defendants the debt and costs claimed by them, and shown by their answer to be due, and the costs of this suit; and in that case, the amount is to be ascertained and the costs taxed by a master, and the judgment and the bond and mortgage to be assigned."

In *Herriman v. Skillman*, 33 Barb. 378, it was decided that the general principle is, that when a creditor has a lien on two funds for the same debt, and another creditor has a subsequent lien on one of the funds only, equity will require the former to resort in the first instance to the fund upon which the subsequent creditor has no lien for the satisfaction of his debt. The rule, however, is subject to some qualifications. Such a course must appear to be necessary for the payment and satisfaction of both debts, and it must not operate to prejudice the rights of the first creditor to the double fund. Neither must there be any reasonable doubt of the sufficiency of the one fund to satisfy the debt of the first creditor. When in a foreclosure suit brought by the holder of the first lien there is reason to think that both the real estate mortgaged and certain personal securities which are subject to the plaintiff's lien would, if brought to sale, be insufficient to pay the debt and interest due from the mortgagor, the equitable rule does not apply in favor of subsequent mortgagees or judgment creditors. In such circumstances, all that the subsequent encumbrancers have a right to claim is a judgment awarding to them, after the payment of the plaintiff's debt, the right in the order of the priority of their respective liens to be subro-

gated to the plaintiff in respect to the securities then held by him.

In *Woollecks v. Hart*, 1 Paige, 185, the plaintiff was a judgment and execution creditor of James Dreamer. The defendant had also an older judgment and execution against the same person, and Dreamer had not sufficient property in the state to satisfy both. The defendant had also an assignment of certain real and personal property in New Jersey as collateral security for his debt, which in his answer he alleged was subject to a prior mortgage, and that the title thereto was doubtful. The complainant applied to him to delay a sale under the execution, and apply the Jersey security in the first place in satisfaction of the debt. This was declined by the defendant; but he offered to assign his judgment and all the collateral security which he held over to the complainant, if he would pay the amount due to him on the judgment, which amount he offered to warrant to be due. The complainant declined this offer, and filed his bill and obtained an injunction. The chancellor said: "Under the circumstances of the case, the defendant was not obliged to delay the collection of his debt until he could apply the proceeds of the Jersey property. The assignment of the Jersey property, although absolute on its face, was only a mortgage; and of course no good title can be given until a foreclosure of the equity of redemption against Dreamer. It would be inequitable for the court to compel him to submit to that delay, when he offers to give the complainant all the benefit which can be derived from that collateral security, by assigning it to him, together with the judgment, on receiving the amount, which he is entitled to collect immediately by a sale on his execution. The injunction must be dissolved, unless the complainant, within ten days after service of a copy of the order to be entered in this cause, pays to the defendant or his solicitor the amount of the defendant's execution, and interest, on the terms of the offer contained in the answer."

In this case, it appears that on the fourteenth day of January, 1881, Simon Ward was indebted to R. E. Hudkins and Brother in the sum of \$1,055; that on the third day of March, 1881, he executed a deed of trust on a large tract of land to secure said debt, which deed was recorded on the fifth day of March, 1881. On the twenty-eighth day of March, 1881, Simon Ward, for the use of Crim and Woodford, recovered a judgment against Hudkins and Brother for \$1,575.31. The

said Crim and Woodford proceeded in the name of Ward to collect the amount of this judgment by execution. On the 4th of November, 1884, the injunction was granted. The defendants resisted the set-off, and asked that, if it was allowed, they might be subrogated to the rights of the plaintiffs in the deed of trust. The court allowed the set-off, but said nothing as to the subrogation. The question as to the defendant's right to subrogation was clearly in issue, and it was silently denied to them. Was this equitable? Hudkins and Brother had two funds to which they could resort for payment. They could set off the \$1,055, or they could resort to their deed of trust. Shortly after the deed of trust was given, Crim and Woodford bought the claim against them. The \$1,055 was properly set off, because, as we have seen, Hudkins and Brother could not be delayed in the collection of their claim; but in equity they ought to have offered to assign to Crim and Woodford this claim against Ward. Crim and Woodford were compelled to pay them the \$1,055 by having it set off, and then surely under the principles of equity they were entitled to be subrogated to their rights, whatever they might be under the deed of trust. They certainly had equal, if not superior, equity to the subsequent lienors, if there were any, on Ward's land; and they were prior in time. They could not be compelled to allow the \$1,055 to be set off without at the same time being placed in the shoes of Hudkins and Brother as to the trust. The court refused to require this, and whether they could claim it or not, they would be met with the claim that under the pleadings in this cause the court had necessarily decided they were not entitled to subrogation.

The decree of the circuit court is reversed, with costs against Hudkins and Brother, and this court proceeding to render such decree as the circuit court should have rendered, the same decree is entered, with this important addition thereto: "But the defendants, J. N. B. Crim and A. M. Woodford, are hereby subrogated to all the rights and interest of R. E. Hudkins, and R. E. Hudkins and Brother, in and to the deed of trust executed on the third day of March, 1881, by Simon Ward to Luther C. Elliot, trustee, to secure R. E. Hudkins the sum of \$1,055, due by single bill of date January 14, 1881, with interest thereon from the date thereon, which deed was recorded in the county of Barbour on the fifth day of March, 1881, a copy of which is filed as an exhibit with the answer of the defendants in this cause."

As to the reversal of the decree with costs, my associates do not agree with me that it sufficiently appears that the error was to the prejudice of the appellants, and that they suffered more than one hundred dollars damages, notwithstanding the fact that it is admitted that Ward is insolvent, and it does not appear that there were no other liens on his land, when the deed of trust filed with the defendant's answer was recorded, there being a general replication to the answer, and no proof or evidence as to these facts. It seems to me that in this state of facts, and in the absence of anything to the contrary, it must be presumed that the deed of trust is worth its face. My associates think that under the circumstances of this case there is no such presumption, and that it should affirmatively appear that the appellants were prejudiced. This fact not appearing, as they think, the decree is corrected as above indicated, and affirmed, with costs to the appellee, and one cent damages.

MARSHALING ASSETS. — DOCTRINE OF AS APPLIED where a creditor may resort to two funds for payment, while another creditor may resort to but one of them, is stated in *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517; 69 Am. Dec. 174, and note 181; *Carter v. Neal*, 24 Ga. 136; 71 Am. Dec. 136, note 142; *Dickson v. Chorn*, 6 Iowa, 19; 71 Am. Dec. 382, and note 387; *Ellis v. Temple*, 4 Cold. 315; 94 Am. Dec. 200; *Cummings's Appeal*, 25 Pa. St. 268; 64 Am. Dec. 695; *Georgia Chemical Works v. Cartledge*, 77 Ga. 547; 4 Am. St. Rep. 96, and note 98.

WHERE A VENDOR'S LIEN IS RETAINED TO SECURE THE PAYMENT of several bonds given for the purchase-money of lands, and a judgment is obtained at law by the assignee of one of said bonds against the principal on said bond and his surety, the surety cannot come into a court of equity and compel such assignee to exhaust his vendor's lien before enforcing the collection of his judgment by execution against the surety, although it is shown that the principal debtor is insolvent: *Armstrong v. Poole*, 30 W. Va. 666.

STRAUGHAN v. HALLWOOD.

[30 WEST VIRGINIA, 274.]

CONFLICT OF LAWS — ACTION TO COMPEL RETURN OF PROPERTY TO STATE —

POWER OF RECEIVER. — Equity will not compel an insolvent defendant, in an action of detinue instituted in West Virginia, to return to that state, nor will it appoint a receiver to bring back the property in dispute to answer the judgment in detinue, where the defendant had, before the commencement of the latter action, sold or pledged such property in good faith to a resident of another state, and placed him in possession thereof, which he has since retained, though such property was forwarded to him to prevent its recovery in an action of detinue which might be brought in West Virginia, where the parties resided.

RECEIVER, FOREIGN. — Where the parties to an action reside in one state, the court of that state has power to appoint a receiver to take possession of the property of the defendant in another state; but such court has no power to remove or cause to be removed personal property from another state, so as to bring it within the jurisdiction of the state in which the court sits which has appointed the receiver.

EQUITY. — SUPPLEMENTAL BILL based on facts occurring since the institution of the suit, seeking relief only as against the original defendant, is in the nature of an amendment to the original bill, and must be read with it, and regarded as one bill.

EQUITY — SUPPLEMENTAL BILL. — When on filing the original bill the plaintiff has no cause of action, he cannot maintain his suit by filing a supplemental bill setting up a cause of action which has accrued since the original bill was filed, though arising out of the same cause of action.

EQUITY — SUPPLEMENTAL BILL. — Where the grounds upon which the original bill was filed are inconsistent and irreconcilable with those upon which the supplemental bill is based, the latter should be dismissed.

Mollohan, Ruffner, and Jackson, for the appellant.

Knight and Couch, for the appellee.

GREEN, J. The defendant, Henry S. Hallwood, claimed that about January 1, 1882, he purchased of George Straughan, the plaintiff's father, a theodolite and a part of a set of drawing instruments. Mathew H. Straughan claimed that this property all belonged to him, and he brought a suit for it against Henry S. Hallwood before a justice of the county of Kanawha, where Hallwood resided. He decided in favor of Hallwood, and an appeal was taken to the circuit court. Hallwood brought a cross-suit in the circuit court of said county, on the chancery side, in reference to this property, and some accounts and claims he set up against George Straughan. But this common-law suit and chancery suit were compromised about March 1, 1886, though, for reasons stated in the opinion, the written agreement setting out the terms of the compromise was not executed by the parties till about March 20, 1886. This agreement was, however, dated March 1, 1886. It was as follows:—

“Whereas, certain litigation and matters of difference exist between Henry S. Hallwood and Mathew P. Straughan, and the said Hallwood and George Straughan, now for the purpose of settling and adjusting such litigation and matters of difference, the said Hallwood, Mathew Straughan, and George Straughan agree with each other, and bind themselves as follows: The suits of Mathew Straughan against Henry S. Hallwood, pending in the circuit court of Kanawha County, on appeal from a justice, and of Henry S. Hallwood against

George Straughan and Mathew Straughan, pending in said court on the chancery side, shall both be dismissed, each party paying his own costs; and the judgment obtained before the said justice is hereby vacated, annulled, and surrendered up; and the said dismissal of said appeal is intended to operate as an avoidance and nullification of said judgment. The said Hallwood agrees to deliver up immediately to the said George Straughan all books, documents, papers, writings, vouchers, and accounts in his possession or under his control, belonging or in any way relating to the business or private transactions of the said George Straughan, and also all letters in his possession or under his control, written by the said George Straughan. The said Hallwood and the said George Straughan hereby release to each other every claim, demand, debt, or liability that each may have or claim against the other, and hereby mutually acknowledge full satisfaction thereof. The theodolite and set of drawing instruments, for which the said action of Mathew Straughan against Henry S. Straughan was brought, are hereby admitted to be the property of said Mathew Straughan; and the said Mathew Straughan hereby agrees to sell said theodolite, and so much of said set of drawing instruments as the justice gave judgment for in said action, to said Hallwood for the sum of \$125, on the following terms and conditions: Said Hallwood is to have ninety days from the date of signing and sealing of this agreement to pay said sum for said theodolite and part of set of drawing instruments, the title whereto to remain in said Mathew Straughan until paid for by said Hallwood according to this agreement; and, by express contract of the parties, the time for paying for the same, as above provided, is made the essence of this agreement, and in default thereto or therein by said Hallwood, all his right, title, and interest thereto or therein is gone forever, and said theodolite and part of set of drawing instruments are to be surrendered up to the said Mathew Straughan. The possession of said theodolite and part of set of drawing instruments, until paid for, or default made in the payment thereof, as above provided, shall remain with James H. Sentz and W. B. Stevens, trustees of the Peerless Coal Company, who shall keep the same safely, subject to the provisions of this agreement.

“In witness whereof, the said parties have hereunto set their respective hands and seals this first day of March, 1886.

“HENRY S. HALLWOOD. [SEAL]

“M. H. STRAUGHAN. [SEAL]

“GEORGE STRAUGHAN.” [SEAL]

These two suits were then dismissed; but Hallwood, who had possession of this property which had been in dispute, did not surrender the possession of it for the ninety days to the trustees of the Peerless Coal Company, as the agreement provided should be done. After ninety days had elapsed from the date of this agreement,—March, 1, 1886,—but before ninety days had elapsed from its execution, Hallwood offered to George Straughan the \$125 named in this agreement as the price agreed on for this property. He had got this money from the trustee, Stevens, who lived in Cincinnati, on a sale of this property on certain conditions or pledges, the terms of which will be explained in the opinion. But the plaintiff knew nothing of this, and supposed Hallwood kept possession of the property after George Straughan had declined to take his offer of \$125 for it, because he thought it was tendered too late, under a true construction of the agreement. Under this belief, on September 14, 1886, Straughan brought, in the circuit court of Kanawha County, an action of detinue to recover this property of Hallwood, who, he thought, still had it. But he discovered immediately afterwards that, directly after he had refused to take this \$125 of Hallwood as the price of this property, he had shipped it to Cincinnati, but he did not know to whom, and he believed that he had done so to defeat the plaintiff in his action of detinue, Hallwood being an insolvent. He then, three days after he brought this action of detinue, brought the present chancery suit, setting out all the facts that are above stated, except that nothing is said about Hallwood's offer to pay to the plaintiff this \$125, except a general allegation that "Hallwood, within the ninety days, never paid or tendered to your orator the said sum of \$125, or any part thereof"; and nothing is said of Hallwood's having got this \$125 of Stevens on a sale or pledge of this property, and shipped it to him in Cincinnati. All that is said in the bill on this subject is, that "Hallwood had fraudulently removed said property beyond and out of the state for the purpose of preventing your orator from enforcing his rights in the courts of this state, where he resides; that he had it shipped to Cincinnati, but he fraudulently secretes the same, and seeks to keep it from answering the said action of detinue, or any other process from the courts of this state to which your orator may lawfully resort."

This bill prays for a discovery as to where this property is, and whether the defendant, Hallwood, had not removed it to

prevent the plaintiff from getting the same by any action or suit in this state, and if not, what was his purpose. He asks an injunction to prevent him and his agents from selling or otherwise disposing of this property; and that he be compelled to bring it back into this state; and that a receiver of the property may be appointed, to whom Hallwood should deliver this property, so that it should be forthcoming to answer said action of detinue; and for general relief. The injunction prayed for was awarded, and took effect. The answer of Hallwood sets forth the facts more fully, and states them very much as they are above stated, except that they are stated more generally, and less in detail. He says that he kept possession of this property instead of letting the trustees of the Peerless Coal Company have the possession of it, for reasons which I need not state here, as they are fully stated in the opinion. It was very inconvenient to give this property to these trustees to keep for these ninety days, because they lived so far from the defendant, and because no harm was done by the defendant's retaining the temporary possession of it, and nobody questioned its propriety. This answer states, after the offer of this money, \$125, as the price of the property, as set out in the agreement, within ninety days of the date of its actual signing and sealing, about March 20, 1886, he considered these instruments as his own, and he shipped them to Stevens in Cincinnati, in compliance with an agreement made with him, whereby he was to furnish the \$125 to pay Straughan for this property, according to the compromise agreement. This shipment was not made till directly after this \$125 was offered to Straughan. He repeats this offer to pay the \$125, and says he is ready to pay it into court for the plaintiff. He says that by his agreement with Stevens, he had a right to hold this property to secure himself; and he says he is informed that Stevens sold it shortly after he got possession of it. This last statement is not sustained by the evidence. Many depositions were taken. They prove the facts before stated herein, and such additional details as are stated in the opinion of this court. A supplemental bill was filed afterwards, and the circumstances under which it was filed and its nature and contents are sufficiently set forth in the opinion, and need not here be stated. The court rendered this final decree in this cause on May 13, 1887: "This cause came on to-day to be heard upon the bill and supplemental bill of complaint, the answer of the defendant.

thereto, with general replication to said answer, and the depositions of witnesses taken and filed in the cause, and was argued by counsel. Upon consideration whereof, the court is of opinion, and doth decide, that the plaintiff is not entitled to the relief prayed for in said bills. It is therefore adjudged, ordered, and decreed that the plaintiff's said bills be dismissed, and that the defendant recover of the plaintiff his costs by him about his defense expended, including twenty dollars, as allowed by law. And the plaintiff desiring to present a petition to the supreme court of appeals for an appeal and *supersedeas* to this decree, it is ordered that the operation and effect of this decree be suspended for the period of sixty days upon the plaintiff, or some one for him, within ten days from this date, executing with good security before the clerk of this court a bond in the penalty of fifty dollars, conditioned as required by section 4 of chapter 157 of the acts of the legislature of 1882." From this decree Mathew H. Straughan has obtained an appeal and *supersedeas* from this court.

From the pleadings and proofs in this case, it appears that cross-actions were pending in the circuit court of Kanawha County, on the common-law and chancery side of said court, in which Mathew H. Straughan and Henry S. Hallwood were parties. The common-law suit involved the title to a theodolite and a part of a set of drawing instruments; and the chancery cause also involved the title to this property, and some dispute about accounts between Hallwood and Straughan's father. About March 1, 1886, the parties to this litigation compromised this and all matters between them. This compromise was to be reduced to writing by the counsel of Straughan in these suits. He did not find time to do this till March 9, 1886. He then prepared it in duplicate; and it was, after being approved by the counsel of Hallwood, sent by mail to the parties to be signed. The Straughans lived in Fayette County, and Hallwood in Kanawha County, some thirteen miles from Charleston, where the counsel of the parties lived. After it was signed by the parties, it was returned to their counsel; and the original, returned by one party with his signature attached, had then to be sent to the other party to obtain his signature. This consumed time, and it took some eleven days after these compromise agreements were prepared before they were executed by all the parties; that is, they were not signed and sealed till about March 20, 1886.

But in drawing them they had been antedated some nine days, being dated as of the time the terms of the compromise had been verbally fixed. In this compromise agreement, as thus reduced to writing and approved by the counsel of the parties, was this provision: "The theodolite and set of drawing instruments for which said action of Mathew Straughan against Henry S. Hallwood was brought are hereby admitted to be the property of Mathew Straughan; and the said Mathew Straughan thereby agreed to sell said theodolite, and so much of said set of drawing instruments as the justice gave judgment for, to said Hallwood, for the sum of \$125, on the following terms and conditions: Said Hallwood was to have ninety days from the date of the signing and sealing of this agreement to pay said sum for said theodolite and part of set of drawing instruments, the title whereof was to remain in said Mathew Straughan until paid for by said Hallwood according to this agreement; and by express contract of the parties, the time for paying for the same as above provided was made the essence of this agreement, and in default thereof by said Hallwood, all his right, title, and interest thereto or therein was to be gone forever, and said theodolite and part of set of drawing instruments were to be surrendered up to said Mathew Straughan. The possession of said theodolite and part of set of drawing instruments until paid for, or default was made in the payment thereof, as above provided, was to remain with James H. Sentz and W. B. Stevens, trustees of the Peerless Coal Company, who shall keep the same safely, subject to the provisions of this agreement. In witness whereof, the said parties have hereunto set their respective hands and seals this first day of March, 1886."

William B. Stevens, one of the trustees of the Peerless Coal Company, lived in Cincinnati; the other of these trustees lived in Kanawha County, West Virginia, about twenty miles from where Hallwood lived, and he was a captain of a steamboat, and was absent from home more than half his time. Under these circumstances, this theodolite and the drawing instruments were not delivered to them to be held by them for the ninety days spoken of in the agreement; but they remained in the possession of Hallwood, who had possession of them when this compromise agreement was made. He was not called upon by Straughan, nor by the trustees of the Peerless Coal Company, for this property, and no inquiry was made of them whether it had been delivered to them; and it is doubtful

whether either of these trustees knew that they were to have the possession of this property for these ninety days.

There is no evidence that any one ever gave them notice that there was any such provision in this compromise agreement. These trustees carried on the mining of the coal lands of the Peerless Coal Company in the county of Kanawha; and Hallwood was in their employment as a mining engineer, and in doing this work a theodolite was very important. This theodolite had been injured before this compromise, and, till repaired, could not be used; but it was worth a good deal more than \$125. Hallwood was insolvent, and had not the means to pay this \$125, and under these circumstances he was anxious to have the use of a new theodolite, which would cost some \$275. About six weeks after this agreement was made, he proposed to Stevens, one of the trustees of the Peerless Coal Company, and the chief manager of its mining business, that if he would let him have \$125 to pay to Straughan for this theodolite and drawing instruments, he could then exchange them for a new theodolite, paying the difference in their value; and the trustees of the Peerless Coal Company would have a good theodolite, so essential to the carrying on of their business successfully, and he would have the means of doing, probably, the mining engineering for them better. Stevens agreed to this, and on June 11, 1886, he sent him a check on the bank of Charleston, payable to Straughan, for this \$125, and it was promptly—probably the next day—offered to the counsel of Straughan as a payment for this theodolite and drawing instruments, under this agreement. This, counsel, who thought it perfectly clear that Hallwood's right to purchase this theodolite and drawing instruments for \$125 expired ninety days after the date of this agreement, March 1, 1886, regarded his privilege of so doing had then expired some two weeks before, and declined to receive this check, assigning this as his reason. The check was perfectly good, and the money could be got on it in a few minutes by presenting it at the bank. He said that for this reason he would not accept this check, but he would write to Straughan and ascertain whether he would take the \$125 then. He did so, and he declined to take this, and let Hallwood have the theodolite and drawing instruments. On the other hand, Hallwood claimed that he had thus offered to pay this \$125 to the counsel of Straughan nearly a week before the expiration of the ninety days spoken of in this agreement as the time which he was to have within which to pay

this \$125 for the theodolite and drawing instruments, as it was to be ninety days from the date of the signing and sealing of this agreement, and it was not signed and sealed by the parties to it till about the 20th of March, 1886.

To settle this controversy, about two months after Straughan brought an action of detinue in the circuit court of Kanawha for this theodolite and drawing instruments; but as soon as he brought the suit, the sheriff, who was ordered to take possession of the property, ascertained that it was in Cincinnati. It had been shipped there by Hallwood to Stevens very shortly after the counsel of Straughan had refused Stevens's check in payment of this theodolite and drawing instruments, because in his judgment it was offered to him when the period had expired when Hallwood had a right to purchase this property for the \$125. Hallwood kept this check for about a month, when, as Straughan, to whom it was payable, would not receive it, he returned it to Stevens, who, so far as this record shows, did not dispose of this theodolite and drawing instruments, as under his agreement with Hallwood he was to do, and purchase a new one, to be used by him as his employee, preferring not to do so till the controversy about it between Straughan and Hallwood was in some way settled, though he was obviously prepared to pay the \$125, and purchase the new theodolite whenever this was done. But though no attempt seems to have been made to prevent these facts from coming to the knowledge of the plaintiff or his counsel, yet they knew none of the facts occurring after the refusal of the plaintiff's counsel to receive Stevens's check of \$125, except that this property had all been shipped to Cincinnati, which was ascertained by the sheriff. As soon as this was ascertained, and but few days after the institution of this action of detinue, the chancery suit we are reviewing was brought in the circuit court of Kanawha. It set out this agreement of compromise between these parties, dated March 1, 1886, stated the facts above stated, that Hallwood had violated this agreement by keeping possession of this property, and not handing it over to the trustees of the Peerless Coal Company, fraudulently, as is charged; that he never paid or tendered to the plaintiff, Straughan, within the ninety days, the \$125, the price at which he was authorized to buy this property.

The bill then states that the plaintiff instituted this action of detinue against Hallwood, to recover this property, four days before the institution of this chancery suit, but that he

had discovered since that he had fraudulently removed all this property to Cincinnati. It alleges that he is insolvent; and a judgment, therefore, against him in this action of detinue would necessarily be worthless; and that the plaintiff is without remedy, save by the process of a court of equity, which can take hold of the person of Hallwood, and compel him to discover where this property is, and to bring it back into this state, and turn it over to the possession of the court, to be held to answer the result of this action of detinue; and this he prays may be done, and that he be enjoined, as well as his agents, from in any way changing the condition, possession, or situation of it, except to comply with the order of this court; and he asks the appointment of a receiver of said property, and an order that said Hallwood deliver this property to him, to answer this action of detinue, and for general relief. The gist of this chancery suit was evidently the fraudulent removal of this property out of this state by Hallwood, an insolvent, to defeat the recovery of it in an action at law by the plaintiff; and that, as it was still in his possession, he might, by a court of equity, be compelled to deliver it up; he being enjoined, in the mean time, from disposing of it to any person.

The facts above stated, proved in the cause, do not sustain these allegations necessary clearly to sustain such a bill. In the first place, the defendant denies in his answer on oath that the sending of this property by him to Cincinnati was done with this or any other fraudulent purpose. The proofs, I think, show that the property was not, as the agreement provided, placed in the possession of the trustees of the Peerless Coal Company, to be held for the ninety days, with any fraudulent purpose, but simply because one of these living in Cincinnati, and the other twenty miles from the defendant, Hallwood, it was inconvenient to deliver this property to them. Was it clear beyond dispute, as the counsel for the plaintiff claims, that under this agreement, when Hallwood tendered the \$125 to the plaintiff within ninety days from the time this agreement was signed and sealed by the parties, about March 20, 1886, that he had not thereafter a right to said property, and a right to send it to Stevens in Cincinnati, in fulfillment of a contract or agreement made with him some time before, which contract had been complied with by Stevens, so far as up to that time he was under obligation to do anything, by sending to Hallwood the check for \$125, payable to the plain-

tiff, as the price of this property? Can it be said that this contract so clearly required this money to be paid in ninety days from the date of the contract, March 1, 1886, that it must be regarded as an intentional fraud on the part of Hallwood to have pretended to regard it as authorizing the payment of this \$125 in ninety days from the actual signing and sealing of this agreement, and not in ninety days from its date? The words of the contract are: "Said Hallwood is to have ninety days from the date of the signing and sealing of this agreement to pay said sum." Is it incredible that he really believed that this meant ninety days from the actual signing and sealing of this agreement, that is, ninety days from March 20, 1886, and not ninety days from the date of this agreement, March 1, 1886? And must we regard his conduct as fraudulent, when based on this interpretation of the contract? No doubt he knew that this ninety days' time was of the essence of the contract, and that he would have no right to pay for and own this property if not paid for in ninety days from March 20, 1886. The contract declared on its face that the time for paying \$125 for this property was to be regarded as of the essence of the contract. It is both common sense and well settled that, by the express stipulations of parties, time may be made of the essence of a contract in a court of equity as well as in a court of law, though, without such express stipulation, it is not in a court of equity usually regarded of the essence of a contract: See *Taylor v. Longworth*, 14 Pet. 172, 174.

The counsel for the appellant, the plaintiff below, in his argument, seems to regard it as perfectly clear that the ninety days named in this contract must, as a legal proposition, run from March 1, 1886. He says: "This contract having declared that the ninety days should run from the date of the signing and sealing thereof, and having made that date the 1st of March, the ninety days must run from that time, no matter when the contract actually took effect"; to sustain which proposition he refers only to 2 Parsons on Contracts, 6th ed., *664. I have examined this authority, and it is not to my mind so clear that it sustains the proposition laid down by appellant's counsel. He says "that if the contract refers to 'the day of the date' or 'the date,' and expresses any date, this day, and not the actual making, is taken." Parsons refers in a note to *Styles v. Wardle*, 4 Barn. & C. 908, and Co. Lit. 46 b, as sustaining the proposition he lays down; and

also to *Armist v. Breame*, 2 Ld. Raym. 1082. These authorities sustain the proposition laid down by Parsons; but they go no further than he has gone; and there is a great difference between the phrases "the day of the date" or the "date," and the phrase used in this agreement of compromise, "the date of the signing and sealing of this agreement." I am not now prepared to say that this does not mean "the day of the actual signing and sealing of this agreement," though the agreement does conclude: "In witness whereof the said parties have hereunto set their respective hands and seals this first day of March, 1886." It may be, in construing this contract, that the parties may be concluded and stopp'd from showing that it was signed and sealed on March 20, 1886, or any other day than March 1, 1886; but I am not at present satisfied that this is so; and I do not propose to examine the question, or express any opinion on the subject, as the question in this case is not, as it is in the *detinue* case, what is the true interpretation of this contract in this respect. But I will inquire simply whether its meaning is so clearly what the appellant's counsel contends it is as to justify us in concluding that it was known to the defendant, Hallwood, that this was its meaning; and in acting on it as if this was not, and pretending he thought that it was not, its meaning, we are justified in concluding that this was a mere pretense, and he was acting fraudulently; for his fraudulent removal of the property from the state must certainly be proven to sustain an interference by a court of equity, as was asked in this case. It would not, I presume, be pretended that if A had personal property in his possession in another state, and B, claiming it, brought an action of *detinue* for it against A in this state, that a court of equity would enjoin A from disposing of it on a bill filed in this state by B, and compel A, by its order, to bring such personal property into the state to answer the result of such action of *detinue*, simply because A was insolvent.

But it is contended by appellant's counsel, that "even though Hallwood may have thought that he had a good title to this property, yet it was fraudulent in him to remove it so as to avoid a suit which Straughan intended to bring against him; and this he did because when this property was sent by Hallwood out of the state he knew perfectly well that Straughan claimed it to be his property." This he certainly did know; and if he removed this property to avoid a process which he expected Straughan would issue, his conduct was

fraudulent. But Hallwood expressly, in his deposition, denies that his object in shipping this property to Stevens out of the state was to prevent Straughan from getting possession of it by legal process in this state; and does it necessarily follow that this is false because he shipped it to Stevens, according to his contract with him, directly after the plaintiff's counsel refused to accept Stevens's check in payment of the property, and claimed that the plaintiff, under this compromise agreement, was not then bound to let Hallwood have this property for the \$125, the amount of the check? The conclusion from these facts, that the defendant, Hallwood, by sending this property to Stevens in Cincinnati, intended to keep the plaintiff from getting possession of this property by legal process in this state, seems to me as at least questionable, as he may then have had no thought that Straughan would bring a suit for this property; and in fact he did not bring any such suit for nearly two months afterwards. If Hallwood had clandestinely or secretly sent this property to Stevens in Cincinnati, the conclusion that he did it fraudulently to prevent a suit for the property against him by the plaintiff would have been justified; but the evidence shows that he did not send off this property clandestinely, but openly. But he may have done it fraudulently, with the intent attributed to him by the plaintiff in his bill. If we admit that he did, the plaintiff's bill would still not be sustained, unless, when it was filed, this property was in the possession of Hallwood or under his control, though it was in Cincinnati; for if it was not in his possession or under his control on September 18, 1886, when this chancery suit was brought, it would obviously have been improper for the chancery court, in this cause, to have entered a decree requiring Hallwood to bring this property back into this state, and deliver it to a receiver of the court, in order that it might be forthcoming to answer this action of detinue. It would, if the property was then neither in his possession nor under his control, obviously be impossible for Hallwood to obey such an order of the court; and the court could not enter such an order, and punish Hallwood for not obeying it, when it was impossible for him to obey, even if the court had been satisfied that he had fraudulently removed this property out of the state to defeat the plaintiff in recovering it in an action of detinue against him.

Now, the evidence shows that this property had been in Cincinnati in the possession of Stevens for some two months

before this suit was brought, and that Stevens claimed it as belonging to him, or to the Peerless Coal Company, because it had been purchased of Hallwood more than two months before the institution of this suit. An order of the chancery court requiring Hallwood to bring this property back, and put the court or its receiver in possession of it, would have been vain and inoperative, and the court had no means of enforcing it; for the imprisonment of Hallwood till he should obey this order would have been not only vain but unjust, as it was out of his power to obey such an order.

But it is said the receiver of the circuit court of Kanawha could have sued in Cincinnati Stevens, or whoever was in the possession of this property, and having recovered it, he could have brought it back to West Virginia, and held it to answer the final judgment in the detinue suit against Hallwood. It is true that a court of one state has the power to appoint a receiver to take possession of property in another state. This has been frequently done where the property is that of a company owning and operating a railroad running through several states: See *Ellis v. Boston etc. R. R. Co.*, 107 Mass. 1; *Wilmer v. Railway Co.*, 2 Woods, 418. In such cases, the court, having jurisdiction of the defendant, can legitimately do all in its power to compel the defendant to put the receiver in possession of the property in another state. But as the court of one state has no jurisdiction outside of its limits, of course it has no power to remove, or cause to be removed, personal property from another state so as to bring it within the jurisdiction of the state in which is the chancery court which has appointed the receiver. If this can be done without contest, the personal property can be taken possession of and removed by the receiver into the state whose chancery court has appointed the receiver; but if it cannot be done without the institution of a suit by the receiver in the courts of the state where the property is situated, the authorities are not agreed as to whether such suit can be brought by a foreign receiver to recover property. In some cases it has been allowed, and in other cases it has been refused. Such suits by receiver appointed in other states were permitted and recognized as legitimate in *Bagby v. Atlantic etc. R. R. Co.*, 86 Pa. St. 291; *Runk v. St. John*, 29 Barb. 585; *Hurd v. City of Elizabeth*, 41 N. J. L. 1. But the courts have in numerous cases, on the contrary, held that such suits cannot be brought by a receiver appointed in another state: See *Booth v. Clark*, 17 How. 322;

Farmers' & M. Ins. Co. v. Needles, 52 Mo. 17. See also, on this question, *Insurance Co. v. Taylor*, 2 Rob. (N. Y.) 278; *State v. Jacksonville etc. R. R. Co.*, 15 Fla. 202; *Warren v. Union Nat. Bank*, 7 Phila. 156; *Hunt v. Columbian Ins. Co.*, 55 Me. 290; 92 Am. Dec. 592. In the case of *Booth v. Clark*, 17 How. 322, Justice Wayne, delivering the decision of the supreme court of the United States, says: "The receiver has no extraterritorial power of official action; none which the courts appointing him can confer with authority to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon principles of comity, the privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where the debtor may be answerable to the tribunal which the creditor may seek." Those cases in which the courts permitted a receiver appointed in another state to sue for and recover property in a different state have apparently based their decisions, not on the right of such foreign receiver to bring such a suit, but on the ground that in the particular case before the court he ought to be permitted to prosecute such suit as a matter of comity only; and that in many, if not all, cases where the rights of their own citizens would be injuriously affected by extending such comity to a foreign receiver, it ought not to be extended; and the courts which are most favorable to the allowing of a foreign receiver to sue in their courts as a matter of comity and convenience are careful to protect the rights of their own citizens as creditors to the property of the debtor within their jurisdiction as against the claims of a receiver appointed by a court of chancery in another state: See *Bagby v. Atlantic etc. R. R. Co.*, 86 Pa. St. 291; *Hunt v. Columbian Ins. Co.*, 55 Me. 290; 92 Am. Dec. 592; *Hurd v. City of Elizabeth*, 41 N. J. L. 1; *Runk v. St. John*, 29 Barb. 585; *Barton v. Barbour*, 104 U. S. 128.

To avoid the difficulties which beset a receiver in suing for property in another state, the practice has arisen of forcing the party whose property is to be taken possession of by a receiver to convey it by a formal deed or assignment to the receiver, which may enable him to bring suits in some states where his right to bring the suit might not be recognized: See *Graydon v. Church*, 7 Mich. 36. These authorities are conflicting, and I have not examined the question sufficiently to form any definite opinion on the question whether, if the circuit court, in this case, as asked by the plaintiff, had appointed a receiver of this theodolite and drawing instruments, the courts

of Ohio would or would not have permitted him to bring an action of detinue or trover against Stevens to recover this property or its value, and bring it within the jurisdiction and control of the circuit court of Kanawha, West Virginia, to answer the final decision of the action of detinue by the plaintiff against Hallwood; or whether, if the circuit court of Kanawha had, by a decree in this cause, and its power over Hallwood, the defendant, and Straughan, the plaintiff, compelled them to execute a transfer of all their interest in this property to its receiver, the courts of Ohio would have permitted him then to bring such a suit or suits against Stevens for such a purpose. I have not deemed it necessary to determine this question; for if we considered that the receiver of the circuit court could in any way have been empowered to bring such suits to recover this property of Stevens, and that the Ohio courts would have permitted such suits to be brought for such purpose, it seems to me clear that the circuit court of Kanawha ought not to have appointed such receiver with such power in this cause. For, in the prosecution of such suit in Ohio against Stevens, there could be no recovery against him, if Hallwood had a good title to this property, when, under the sale or pledge of it, he had put Stevens in the possession of it; so that the receiver would, in such suit, have had to prove that the plaintiff, Straughan, had a good title to this property, and not Hallwood. If, then, this would have been in issue in such suit by the receiver, what is the use of his being appointed, as the plaintiff, Straughan, can successfully, without the interference of a court of equity, recover this property or its value in the Ohio courts as readily as the receiver could. The right of the plaintiff to bring such suit no one disputes or could dispute, while the right of the receiver to institute such a suit would no doubt be disputed, and perhaps he would not be entertained to try such suits in the Ohio courts. The remedy of the plaintiff for the wrongs he asserts he has sustained would, by no decree which the court could render in this cause, be at all improved, or rendered less onerous. In fact, it is shown by the evidence that while Stevens lives in Ohio, he is frequently in the county of Kanawha, West Virginia, as manager of the Peerless Coal Company, managing its mining; and the plaintiff, if he chose, could institute such a suit against him in the circuit court of Kanawha. It is not pretended that he is not able, pecuniarily, to pay any judgment which could be rendered against him in such suit. The court, therefore,

could render no decree on the original bill and proofs in the cause in behalf of the plaintiff, and could do nothing but dismiss the bill.

Was the plaintiff's case rendered any better by his supplemental bill? It seems to me it was not. It in substance alleges that since the filing of the bill, the defendant, Hallwood, had received, only the day before the supplemental bill was filed by leave of the court, \$125 from Stevens, upon his pledge of this theodolite and drawing instruments, made when he sent them to Stevens in Cincinnati, some two months before the institution of this chancery suit; and that Hallwood had this identical \$125 in his possession, and had only the day before the filing of this supplemental bill so sworn in his deposition then being taken; and he produced the notes making up this \$125, and tendered them to the plaintiff's counsel in full payment of the price of this theodolite and drawing instruments, as fixed by this compromise agreement, dated March 1, 1886. And this supplemental bill prays that he be enjoined from parting with these notes, and be required to pay them over to a receiver of this court, when appointed, to be used, if necessary, in redeeming this theodolite and drawing instruments of Stevens; and if this cannot be done, then to be used in paying the plaintiff's just claim so far as it will pay it, in case he cannot get the property itself under the control of the court, and for general relief. The injunction asked has been granted. If all the facts claimed by this supplemental bill were proven, could the court render any decree based upon it in favor of the plaintiff? It seems to me it could not. When a supplemental bill is based on facts occurring since the institution of the suit, and seeks relief only against the original defendant, no new parties being introduced, it is in the nature of an amendment of the original bill, and must be read with it, and the two must be regarded as one bill; just as when an amended bill is filed, merely correcting statements in an original bill, the two are regarded as constituting one bill. This proposition is abundantly sustained by the authorities: See *Hill v. Hill*, 10 Ala. 527; *Cunningham's Adm'r v. Rogers*, 14 Id. 147; *Gillett v. Hall*, 13 Conn. 434; *Mason v. York etc. R. R. Co.*, 52 Me. 107; *Clark v. Society*, 46 N. H. 272; *Chouteau v. Rice*, 1 Minn. 106 (Gil. 83). It would seem to follow that if, on the original bill, when all imperfections in it are disregarded, and the evidence in the cause, the plaintiff has no cause of action at the time of filing

his original bill, he cannot maintain his suit by filing a supplemental bill setting up a cause of action that had accrued after the original bill was filed, even though it arose out of the same cause of action that was the subject of the original bill. A new cause of action should not thus be permitted to be presented by a supplemental bill; for, such supplemental bill being a part and an addition to the original bill, and to be read with it, to permit this would be to violate the obvious principle that in every case the cause of action must exist at the time the suit is brought. This seems to be recognized by the Alabama decisions: See *Hill v. Hill*, 10 Ala. 527; *Vaughan v. Vaughan's Heirs*, 30 Id. 330, 334; see also *Milner v. Milner*, 2 Edw. Ch. 114, where it was held that a complainant cannot file a supplemental bill to introduce new facts which have occurred since the filing of the original bill, and upon which a decree can be had without reference to the original bill. The complainant in such case should dismiss his old bill, and file an entirely new one. The law as I have stated it, sustained by the Alabama decisions, while not disputed, so far as I know, is nevertheless qualified by the decision in *Pinch v. Anthony*, 10 Allen, 471, 477. Chapman, J., in delivering the opinion of the court, on page 477 says: "We have found no authority that goes so far as to authorize a party who has no cause of action at the time of filing his original bill to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even if it arose out of the same transaction that was the subject of the original bill. It would seem to be contrary to principle to allow it to be done. *Milner v. Milner*, 2 Edw. Ch. 114, is an authority against allowing a new cause of action to be stated in a supplemental bill. But the plaintiff may, by means of a supplemental bill, introduce into his case facts that have occurred since the original bill was filed. The extent to which this may be done is not definitely settled, but if he goes too far in this respect, the defendant has opportunity to object to it when leave is asked to file the supplemental bill: *Pedrick v. White*, 1 Met. 76; or by demurrer to the bill for that cause after it is filed. In this cause, the defendant did demur, but did not present this as a ground of demurrer: *Pinch v. Anthony*, 8 Allen, 536. The cause was sent to a master, and was recommitted to him, by consent of both parties, for the purpose of being fully heard on its merits; and it has been so heard, and his report embraces every matter that would have

been needful if a new bill had been filed. The objection to the supplemental bill ought, therefore, to be regarded as waived: *Pingree v. Coffin*, 12 Gray, 288, 323; Story's Eq. Pl. 528, and note; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 369."

The two cases referred to really throw no light on the subject, not being cases in which any supplemental bill was filed, and merely showing, in certain cases, a party may waive his right by not objecting at the proper time; and what is said in Story amounts to no more, except that in the note it is said that "when the matter which arises subsequent to the filing of the bill, and properly the subject of a supplemental bill, is stated by amendment, and the defendant answers the amended bill, it is too late to object to the irregularity at the hearing." This is doubtless true; for as the plaintiff had a good cause of action, and the new matter could have been legitimately brought in by a supplemental bill, the bringing of it irregularly by an amended bill was a matter, not of substance, but of form, and might well be regarded as waived by the failure to object at the proper time, and answering such bill. But this would be very different if the facts arising since the original bill were really the only facts upon which the plaintiff had any cause of action; there being no facts existing which gave the plaintiff any cause of action when the original bill was filed. In the case before us, the supplemental bill was filed December 10, 1886, while the deposition of Hallwood, the defendant, was being taken; and nothing whatever was done afterwards, excepting the finishing of his examination, and the examination of a witness two days after, whose evidence was really immaterial. All the evidence thus taken after the filing of this deposition had reference solely to the matter in the original bill, and in no manner related to the new matter set out in the supplemental bill. In less than a month afterwards the court heard the case, and dismissed the bill and supplemental bill. Even if the defendant could waive an objection based on the fact that the plaintiff had no cause of action when he instituted his suit, but it arose subsequently, there was certainly no such waiver to be inferred from anything done by him in this cause subsequent to the filing of this supplemental bill. But it does not seem to me that mere failure to object to its filing, or to demur to it, could in no case prevent his relying on the fact that the evidence showed that when the plaintiff had brought his suit, and filed his bill, he had no cause of action.

There is another objection to this supplemental bill, so fatal that the court was bound to dismiss it at the hearing. The supplemental bill being but an addition to the bill, and, as asked for on the very face of this bill, to be read with it, of course no decree could be rendered upon it if it was based upon grounds, and sought a redress, utterly inconsistent with the original bill. In such case, the court, at the hearing, might give to the statements and grounds set out in the original bill and in the supplemental bill a liberal construction, so as to reconcile them, and might not refuse the plaintiffs relief simply because some of the statements of the supplemental bill were in conflict with statements in the original bill: *Chouteau v. Rice*, 1 Minn. 106 (Gil. 83). But it could do no more. If, after this were done, it still appeared that the grounds on which the original bill was based were utterly inconsistent and irreconcilable with the grounds on which this supplemental bill was based, the court could grant no relief to the plaintiff on his supplemental bill. The ground on which this supplemental bill is based is, that the theodolite and drawing instruments were a trust fund in the hands of the defendant, Hallwood, for the use of the plaintiff; and he having, by a sale or pledge of them, received a check for \$125, which was still in his hands, and could be clearly identified, this check should be rendered liable to all the rights of the plaintiff, just as the original property held in trust could have been held, had it not been wrongfully converted into these notes. This claim is based on the familiar principle that where a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the original owner or *cestui que trust*.

The appellant's counsel refers to *National Bank v. Insurance Co.*, 104 U. S. 54, 26 Am. Law Reg. 71 (February, 1887), and notes to *Fletcher v. Sharpe*, 108 Ind. 276, and 2 Story's Eq. Pl., secs. 12, 58, as establishing this legal proposition, which he states in his brief. There is no question but these, and innumerable other cases show clearly that this is the law. The difficulty is, the evidence shows beyond controversy that the defendant, Hallwood, never did occupy any confidential relation of any sort to the plaintiff, Straughan, and the property in controversy never was a trust fund in the hands of Hallwood for the use of Straughan, and therefore this law has no sort of application in this cause. The plaintiff brought an

action of detinue against the defendant for this property, which he could not have done if the plaintiff held it for his use as trustee, his only remedy against his trustee, the defendant, being by a suit in equity. In his original bill, the plaintiff maintains the same attitude that he assumed when he brought his action of detinue. In fact, the original bill was filed as an auxiliary proceeding to aid the plaintiff in his action of detinue, by compelling the defendant, or a receiver of the court, to bring the property in dispute back into this state from the state of Ohio, so that it might be here to answer the judgment anticipated in the action of detinue then pending. The claim that the plaintiff was the legal and equitable owner of the property, which the defendant had wrongfully got possession of under a false claim that he was the legal and equitable owner thereof, which is the ground on which the original bill is based, is wholly inconsistent with the ground on which the supplemental bill is based, that the defendant held this property as trustee for the use of the plaintiff, and had wrongfully converted it into bank notes. The two grounds are utterly irreconcilable; and for this reason, as well as the others I have assigned, this supplemental bill should have been dismissed.

There was no error, therefore, in the decree of the circuit court of Kanawha of January, 18, 1887, appealed from, and it must be affirmed, and the appellee must pay to the appellant his costs in this court expended, and thirty dollars damages.

RECEIVERS, TERRITORIAL POWERS AND JURISDICTION OF. — As a general rule, a receiver appointed by the court of one state has no power, as a matter of right, to bring suits regarding matters pertaining to his receivership in the courts of other states. The prevailing doctrine as established by the supreme court of the United States, and followed pretty generally by the courts of the different states, is, that a receiver has no extraterritorial power; that for the purposes of litigation his powers are limited to the state in which he receives his appointment, and that principles of comity do not apply as strict matter of right to such cases, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction. Perhaps the leading case on the subject is that of *Booth v. Clark*, 17 How. 322. It was there determined that a receiver of the effects of a New York judgment debtor, appointed by a court in that state, could not file a bill in a court of the District of Columbia for the purpose of obtaining possession of a fund due the debtor, for the reason that the court could not recognize the power of the receiver to institute an action in a jurisdiction other than that of his appointment. The court said, Mr. Justice Wayne delivering the opinion: "A receiver is appointed under a creditor's bill for one or more creditors, as the case may be,

for their benefit, to the exclusion of all other creditors of the debtor, if there be any such, as there are in this case. Whether appointed, as this receiver was, under the statute of New York, or under the rules and practice of chancery, as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation upon his action; his responsibilities are unaltered. Under either kind of appointment he has, at most, only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by direction of the court into ability to act. He has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principles of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek. . . . We think that a receiver could not be admitted to the comity extended to judgment creditors without an entire departure from chancery proceedings as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver according to chancery practice would be to transfer him from the locality of his appointment to that where he asks to be recognized for the execution of his trust in the last under the coercive ability of that court; and that it would be difficult to do where it may be asked to be done, without the court exercising its province to determine whether the suitor or another person within its jurisdiction was the proper person to act as receiver."

The doctrine above set forth has been recognized and followed by many of the state and national courts. Among the cases supporting this rule may be cited *Wilkinson v. Culver*, 23 Blatchf. 416; *Reynolds v. Stockton*, 43 N. J. Eq. 211; 3 Am. St. Rep. 305; *State v. Jacksonville etc. R. R. Co.*, 15 Fla. 201; *Holmes v. Sherwood*, 3 McCrary, 405; *Kain v. Smith*, 80 N. Y. 458; 8 Abb. N. C. 426; *Killmer v. Hobart*, 58 How. Pr. 452; *Mosely v. Burrois*, 52 Tex. 396; *Olney v. Tanner*, 21 Blatchf. 540; *Brigham v. Luddington*, 12 Id. 237; *Warren v. Union National Bank*, 7 Phila. 156; *Hope etc. Ins. Co. v. Taylor*, 2 Rob. (N. Y.) 278; *Farmers' etc. Ins. Co. v. Needles*, 52 Mo. 17; *Willits v. Wade*, 25 N. Y. 577; *Hunt v. Columbian Ins. Co.*, 55 Me. 290; 92 Am. Dec. 592; *Keokuk v. Elder*, 18 Kan. 150. In this connection, Robinson, J., delivering the opinion in *Bartlett v. Wilbur*, 53 Md. 485-494, wrote: "Strictly speaking, the powers and functions of a receiver for the purposes of litigation are limited to the courts of the state within which he was appointed, and he has no extraterritorial jurisdiction or power to institute suits in another state for the recovery of property due the person or estate subject to the receivership. In some states, it is true, he has been permitted, upon the principle of comity, to file claims and receive money due the estate, but he has never been allowed by a foreign court to interfere with its jurisdiction which has attached prior to his appointment. Here the proceedings in attachment were instituted long prior to the appointment of a receiver." The same doctrine is adopted in *Day v. Postal Telegraph Co.*, 66 Md. 354. A receiver appointed

by the federal court of one circuit cannot sue as receiver in a federal court in another circuit, because such courts exercise only a local and limited jurisdiction, and a receiver appointed in one of them cannot sue in another territorial jurisdiction: *Brigham v. Luddington*, 12 Blatchf. 237. And again, a receiver appointed in one state in proceedings supplementary to execution cannot institute a suit in a district court of the United States to set aside, as fraudulent as to creditors, a general assignment made by the debtor of all his property, before such receiver was appointed, where after his appointment an assignee in bankruptcy of the debtor was appointed, who is made a party to the suit: *Olney v. Tanner*, 21 Id. 540. So where the receiver of an insurance company appointed by a court in Illinois brought an action in Missouri on a note in favor of the corporation, it was held in the latter state that the receiver as such could not maintain the action: *Farmers' etc. Ins. Co. v. Needles*, 52 Mo. 17. Again, in a garnishee action in the court of one state against the debtor of a corporation existing under the laws of another state where judgment had been obtained against the garnishee, it was held that the receiver of such corporation, appointed in a creditor's suit in the state of its domicile, could not contest the plaintiff's right to a verdict obtained in the garnishee suit in the state first mentioned: *Warren v. Union National Bank*, 7 Phila. 156. While it may be said, without fear of successful contradiction, that the rule is firmly established that a receiver has no extraterritorial power, as a matter of right, still there is nothing to prevent courts of states other than that of his appointment from extending to him the privilege of suing in their courts if they see fit so to do. Such privilege is often granted as a matter of favor and comity, when it can be done without interfering with the rights and interests of the citizens of the state granting the permission. As has been said, this privilege is an exception to the general rule, and not a matter of right, and the granting of the permission is discretionary with the court whose aid is invoked. However, this exception has been so often recognized as to have become as firmly established as the rule itself, and has led Mr. High, in his treatise on receivers, second edition, section 241, to say: "It is thus apparent that the exceptions to the rule have become as well recognized as the rule itself, and the tendency of the courts is constantly toward an enlarged and more liberal policy in this regard, and it is believed that the doctrine will ultimately be established, giving to receivers the same rights of action in all the states of the Union with which they are invested in the state or jurisdiction in which they are appointed."

In the following cases, under a variety of circumstances, some of which will be hereafter stated, the rule of comity has been extended where the privilege could work no detriment to the citizens of the state granting it, and where it did not contravene the policy of her laws: *Chicago etc. Ry Co. v. Keokuk etc. Co.*, 108 Ill. 317; 48 Am. Rep. 557; *Pond v. Cooke*, 45 Conn. 126; 29 Am. Rep. 668; and see *Cooke v. Town of Orange*, 48 Conn. 401, growing out of the same facts and maintaining the same rule: *Bank v. McLeod*, 38 Ohio St. 174; *Hurd v. City of Elizabeth*, 41 N. J. L. 1; *Graydon v. Church*, 7 Mich. 36; *Runk v. St. John*, 29 Barb. 585; *Bagby v. Atlantic etc. R. R. Co.*, 86 Pa. St. 291; *Hoyt v. Thompson*, 5 N. Y. 320; *Taylor v. Columbian Ins. Co.*, 14 Allen, 353; *Metzner v. Bauer*, 98 Ind. 425; *Pugh v. Hurth*, 52 How. Pr. 22; *Iglehart v. Bierce*, 36 Ill. 133; *Ex parte Norwood*, 3 Biss. 504; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Bidlack v. Mason*, 26 Id. 230; *Paradise v. Farmers' etc. Bank*, 5 La. Ann. 710; *McAlpin v. Jones*, 10 Id. 552. Some of the circumstances under which the principle of comity is indulged will be shown by the following cases: In *Cagill v. Wooldridge*, 8 Baxt. 580, 35 Am.

Rep. 716, it was held that where the court of a sister state, having jurisdiction of the parties and subject-matter, and having the property within its actual control, appoints a receiver to take possession of and sell the property, and this order is executed by the property being actually taken into possession by the receiver, this will give him, against the parties to the litigation and those claiming under them, a special property and right of possession, which will enable him to maintain an action of replevin, and that right will not be lost by sending the property into Tennessee for sale. To this extent the court of the latter state will respect the order and judgments of the court of a sister state. The receiver can, in his individual capacity, maintain an action to recover the property from an attaching creditor in Tennessee, notwithstanding he may have failed until afterward to qualify and give bond as such.

In *Pugh v. Hurtt*, 52 How. Pr. 22, it is said that the only ground on which the courts of New York will refuse receivers appointed by the courts of sister states the privilege of suing in the former seems to be where the claim comes in conflict with the rights of creditors in that state. Its courts will not sustain the lien of foreign assignees or receivers in opposition to a lien created by attachment under its law, nor extend their courtesy so far as to work a detriment to the citizens of that state who have given credit to the foreign insolvent. In all other cases comity demands that such receiver be allowed to sue. And again, in *Lycoming etc. Ins. Co. v. Wheelock*, 55 Vt. 526, it is held that a foreign receiver of an insolvent insurance company may maintain an action in Vermont to recover assessments on premium notes, no creditor having intervened to oppose the prosecution of such suits.

So in *Hurd v. City of Elizabeth*, 41 N. J. L. 1, the court maintained that a receiver appointed in a foreign jurisdiction, and clothed with authority to take the designated property wherever found, may sustain an action for it in New Jersey, when the creditors of the party represented by the receiver do not intervene.

Again, in *Graydon v. Church*, 7 Mich. 36, where, under a creditor's bill in a chancery court in New York, a receiver was appointed, and the debtor, under order of court, made a general assignment to the receiver of all of his property, reciting that it was made in due form to convey landed interests under the Michigan statutes, it was held that such receiver might file his bill in the latter state to foreclose a mortgage, or to enforce a right of redemption held by the debtor at the time the assignment was executed, in land situate in that state; that he did not sue strictly in his capacity of receiver by virtue of his New York appointment, but as an assignee, holding the legal interest in the property.

In *Runk v. St. John*, 29 Barb. 587, the court said: "The plaintiffs are receivers of a corporation chartered in the states of Pennsylvania and New Jersey, and were appointed under a decree dissolving the corporation, made by the court of chancery in the latter state, and were confirmed by an act of the legislature of the former. The defendant's counsel denies the capacity of the receivers appointed in other states and countries to sue in the courts of this state. The laws and proceedings of other sovereignties have not, indeed, such absolute and inherent vigor as to be efficacious here under all circumstances. But in most instances they are recognized by the courtesy of the courts of this state; and the right of foreign assignees or receivers to collect, sue for, and recover the property of the individuals or corporations they represent has never been denied except where their claim came in conflict with the rights of creditors in this state. All that has been settled by

the decisions to which we have been referred on this subject is, that our courts will not sustain the lien of foreign assignees or receivers in opposition to a lien created by attachment under our own laws. In other words, we decline to extend our wonted courtesy so far as to work detriment to the citizens of our own state who have been induced to give credit to the foreign insolvent. But this question does not arise in the case before us. This is not a contest between foreign creditors and domestic attaching creditors. The plaintiffs, on behalf of the interests they represent, seek the equitable interposition of this court to set aside an alleged fraudulent conveyance of land situated in the state of Pennsylvania."

In *Bagby v. Atlantic etc. R. R. Co.*, 86 Pa. St. 291, it was held that where a receiver has been appointed by the court in another state, his appointment will be recognized by the courts of Pennsylvania on the ground of comity, when his claims do not come in conflict with rights of citizens of the latter state. See also, to the same effect, *Hoyt v. Thomson*, 5 N. Y. 320; *Metzner v. Bauer*, 98 Ind. 425. In *Bidlack v. Mason*, 26 N. J. Eq. 231, it is maintained that, on principles of comity, the aid of the New Jersey court will be extended to the receiver of a foreign corporation seeking to obtain possession of property belonging to it there, as against the officers of the corporation seeking by fraud or subterfuge to withhold it. This ruling is affirmed, independent of statutory considerations, in *National Trust Co. v. Miller*, 33 Id. 155.

Where a bond and mortgage have been executed to the receiver of the assets of an insolvent corporation appointed in another state, such receiver, or his successor, may maintain an action in another state to enforce payment thereof: *Iglehart v. Bierce*, 36 Ill. 133. To the same effect, *Bank v. McLeod*, 38 Ohio St. 174. So where property has been fraudulently or feloniously removed from the jurisdiction of the courts of another state, a receiver appointed there may reclaim it through the instrumentality of the courts of Louisiana: *McAlpin v. Jones*, 10 La. Ann. 552. In *Parsons v. Charter Oak Ins. Co.*, 31 Fed. Rep. 305, it appeared that a life insurance company organized under the laws of Connecticut owned real estate and had policy-holders in Iowa, and that, having become insolvent, a receiver had been appointed in Connecticut. Subsequently, in a suit by Iowa creditors, the court of that state appointed a receiver of the property located there, and it was claimed that the Iowa creditors had a superior right to such property, and that the foreign receiver could not control assets outside the state of his appointment. But it was determined that as the statutes of Connecticut provided for receivers, it was part of the contract with policy-holders that in case of insolvency a receiver so appointed should marshal all assets, so that his power was not limited as that of a receiver usually was, and that the Connecticut receiver controlled all of the company's assets. In *Weller v. Pace Tobacco Co.*, 2 N. Y. Sup. Ct. 292, it was held that a receiver appointed by a court in another state, by an order directing a resident member of a firm owning stock to assign it to the receiver, and to make him an attorney in fact to transfer the stock to himself as receiver on the company's books, acquired the legal title to the stock by such proceedings, regardless of his receivership, and a New York court will aid him in making the transfer. In *Ex parte Norwood*, 3 Biss. 504-512, the court decided that the receiver of a bankrupt corporation in another state can prove a debt against a bankrupt in the circuit court of the United States. In the course of his opinion, Blodgett, J., said: "To my mind, there is, to say the least, a strong analogy between the right of the receiver in this case to prove the debt due the estate he repre-

sents and the right of the executor or administrator appointed in another state to represent the right of a deceased creditor before this court, and prove a debt due his testator or intestate, and such right has never been drawn in question. Under authority of all the bankrupt laws which have been passed by the Congress of the United States, the practice has been uniform, so far as I can ascertain, to allow guardians, executors, administrators, and all persons acting in a representative capacity, to appear before the bankrupt court and prove the claims pertaining to the estate which they severally represent. If the bankruptcy proceedings were pending before a United States court in the state of New York, there can be no doubt that such court would recognize the rights of the receiver in this case, and allow him to prove this claim. Why should a federal court of the state of New York recognize the authority of this receiver appointed under the laws of the state of New York, without any relation to the federal laws or the bankrupt law, any more than this court should? Do state lines make any difference? The federal courts take judicial notice of all of the laws of all of the states, and of the powers of all state officers, whether executive or judicial. It seems to me it would be applying a very narrow rule to the provisions of the bankrupt law, and limit the usefulness of that statute very considerably, if the federal courts should require all executors, administrators, guardians of minors, or conservators of insane or idiotic persons, as a condition precedent to the proving of their claims against the estate of their debtors, to take out auxiliary or supplemental letters of administration or guardianship from the state courts within the jurisdiction of the court where the bankruptcy proceedings were pending. The bankrupt law is national in its application. It is intended to serve all creditors alike, and give all creditors acting in a representative capacity, resident out of the district as well as those within the district wherein the proceedings are pending, all the rights to prove their debts which natural persons might exercise; and it seems to me that this court would do gross injustice to the principles of the law to hold that this receiver, clothed as he is with full powers by the law of the state of New York to represent the estate of the Lorillard Insurance Company, and standing by virtue of the decree of the supreme court of the state of New York in the shoes and place of such company, should not be allowed to prove his debt here as fully as if he had been vested with those powers by virtue of a decree from any court within this district."

JURISDICTION AS TO SUITS BY RECEIVERS APPOINTED IN OTHER STATES: See elaborate note in *Alley v. Caspari*, 6 Am. St. Rep. 185-189, as to actions by such receivers beyond the states where appointed, and the territorial limitation of their authority, etc.

HEAVNER v. MORGAN.

[80 WEST VIRGINIA, 335.]

SPECIFIC PERFORMANCE — DEFECT IN TITLE. — If a vendee has purchased land and received a conveyance of general warranty, he will not be required to pay all the purchase price, if the title is defective, or part of the land is claimed by other parties. Upon proof of the defect in the title, he will not be required to pay the purchase price until such defect is removed, or a proper abatement in such price is decreed, if he insists on having that part of the land for which a perfect title can be given.

CONFLICTING DEEDS — INTERLOCK. — Where conflicting grants or deeds cause an interlock, and the elder grantee or owner is in actual possession of his land outside the interlock, and the junior grantee or adverse claimant is in actual possession of a part of the interlock, claiming the whole to the extent of his boundary, such possession of the former outside the interlock will not limit the possession of the latter to his inclosure, but he will be held to be in adverse possession of all the land in the interlock.

SPECIFIC PERFORMANCE — DEFECT IN TITLE — ABATEMENT IN PRICE. — Where, under a bill for specific performance, it is questionable whether the vendor had title to part of the land he sold, the vendee claiming an abatement for the loss of land to which he cannot have title, the court will not fix the average price per acre of the entire tract sold as the rule of abatement, but will adopt as the measure of abatement such portions of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract.

SPECIFIC PERFORMANCE — DEFECT IN TITLE. — When, in a suit to enforce a vendor's lien, the answer resists payment on the ground that part of the land is claimed and held by certain parties by title paramount, unless such answer shows on its face that *prima facie* the title is defective, it is not sufficient; but if it does show this, the plaintiff cannot reply specifically, but must amend his bill, and make all such parties who set up such *bona fide* claims defendants to his bill, and show by his bill, if he can, that his title is clear and valid. If he does not intend to insist on title as against the defendants, or any of them, who are claiming his land, or part thereof, as shown by the answer, let him say so in his bill, and he need not make such parties defendants; but he will not be permitted to require defendant, who is the purchaser, to pay for any land to which the said third party appears to have had a good title, but which the court thinks has been lost by adverse possession, unless such party is a defendant to the suit. If the claim of such third party to the land sold to the vendee is based on such grounds as will put a reasonable man in just apprehension of losing his land, such claimant should be made defendant to the suit, that the rights of all parties may be protected.

C. C. Higginbotham, for the appellant.

A. M. Poundstone, for the appellee.

JOHNSON, President. On the sixth day of April, 1854, John McWhorter and Alexander S. Withers and wife conveyed to Leonard Crites "all the following described tract or parcel of

land lying and being in the county of Upshur, being lot No. 14, the division of a tract of thirty thousand acres, sold as delinquent and forfeited in the county of Lewis by commissioners of delinquent and forfeited land for said county of Lewis, as forfeited in the names of John Davenport and others, as by the plat constituting part of the record in said cause, in the clerk's office of the circuit court of Lewis County, will more fully and at large appear; the said lot No. 14 containing one thousand acres, more or less." Leonard Crites, by the third clause of his will, dated July 25, 1866, and admitted to probate on the thirteenth day of April, 1869, "devised to his sons John D. Crites and William M. Crites all the lands lying on the east side of Buckhannon River, improved and unimproved, each having an equal interest therein." By the fourth clause of said will, he "devised to Joseph Crites, Abraham Crites, Mary Crites, Catherine Crites, and Rebecca Crites, the residue of the unsold lands on the west side of Buckhannon River, each having an equal interest therein." On the eighth day of September, 1870, John D. Crites and wife, William M. Crites and wife, Elizabeth Crites, widow of Leonard Crites, and Mary Crites, Catherine Crites, and Rebecca Crites, conveyed, by deed of that date, to Thomas Selby, "all that certain piece or parcel of land situated in the said county of Upshur and state of West Virginia, on the east bank of the Buckhannon River, and bounded and described as follows, to wit," etc. The metes and bounds are set out. The deed continues,—"containing 203 acres, be the same more or less; it being the same land devised to John D. Crites and William M. Crites by the last will and testament of Leonard Crites, deceased."

In a chancery suit in the name of H. B. Clark against Thomas Selby and others, the said land was sold, and purchased by W. G. L. Totten, to whom the sale was confirmed; and C. C. Higginbotham, the special commissioner appointed for the purpose, conveyed the same to him by the same metes and bounds as are in the deed from the devisees of Leonard Crites to said Selby. By written contract, executed on the fourteenth day of October, 1874, for the consideration of \$2,500, — \$500 cash; \$416.66 $\frac{2}{3}$ costs to be paid on the fourteenth day of April, 1875; \$604.16 $\frac{2}{3}$ on the fourteenth day of October, 1875; \$604.16 $\frac{2}{3}$ on the fourteenth day of April, 1876; and \$325 on the fourteenth day of October, 1876,—the said W. G. L. Totten sold said tract of land to Morgan Morgan, describing

it as "a tract or parcel of land situated in Upshur County, West Virginia, on the right-hand fork of the Buckhannon River, adjoining lands of James Ross, Abraham Crites, Jacob Crites, and others, and the same tract of land conveyed by John Crites and other heirs of Leonard Crites, deceased, to Thomas Selby, and this day sold by C. C. Higginbotham, commissioner in the chancery cause of H. B. Clark against Thomas Selby and others, in the county court of Upshur County, to the said W. G. L. Totten, containing 203 acres. And the said W. G. L. Totten hereby binds himself to execute to the said Morgan a deed for said tract of land, on the fourteenth day of April, 1876, with covenants of general warranty." All the purchase-money was paid except the last note of \$325, which was dated October 14, 1874, due two years after date, with interest from the date. On October 14, 1875, the said Totten, for value received, assigned the said note to Elias Heavner.

Elias Heavner filed his bill in the circuit court of Upshur County, in which he set out these facts: He exhibited the contract from Totten to Morgan, the unpaid note for purchase-money, the assignment thereof to himself; also the fact that, in pursuance of the contract, Totten, on the twenty-seventh day of January, 1881, executed a deed with general warranty to said Morgan for said land, and acknowledged the same for record, but that Morgan refused to accept it, and tenders the deed as an exhibit with his bill. He further alleges that the said tract of land contains 203 acres. The plaintiff prayed for a specific performance of said contract, and that said land might be sold, and the proceeds applied to the payment of the unpaid purchase-money. The said Morgan and Totten were made defendants to the bill. Morgan answered the bill, admitting the sale, exhibited the contract, and further said "that an exact quantity of land is specified in said contract, as sold to him, to wit, 203 acres; . . . that said Totten did not, in said written contract, give metes and bounds to lands sold to defendant, but described the same as adjoining lands of James Ross, Abraham Crites, Jacob Crites, and others, and the same tract of land conveyed by John D. Crites and others, heirs of Leonard Crites, deceased, to Thomas Selby; said land, when so conveyed to Selby, was not surveyed; . . . that all the bonds or notes made to him by said Totten, specified in said contract, have been paid, except the bond for \$325; . . . that something more than a year after said pur-

chase defendant learned that there were not 203 acres of land in the tract so sold to him by said Totten; that a part of the land embraced in said contract was owned by James Ross, and part by Mrs. Ely; and as soon as defendant learned said fact, he so informed said Totten. At first, said Totten claimed that all the land he sold to said defendant he owned, but afterwards admitted that Mrs. Ely and James Ross would hold those parts claimed by them which had been embraced in said contract, and therefore said Totten made an effort to purchase said parts from said Ross and D. D. T. Farnsworth, agent of Mrs. Ely, but failed to do so, and has not purchased the same.

"Deducting the portions embraced in said contract (and also embraced in the deed filed by the plaintiff with his bill as exhibit C) claimed and owned by Mrs. Ely and said Ross, defendant alleges there is a deficiency in the quantity of said 203 acres. Instead of 203 acres, there are only 167 acres and 48 square poles; making a deficiency of 35 acres and 112 square poles. Defendant says he has already paid and overpaid for the true quantity of land so sold to him by said Totten, and has overpaid the same, to wit, \$—, and is entitled to recover the same from him; and is entitled in this suit, as against the plaintiff, to have said bond for \$325 canceled; . . . that he refused, and herein refuses, to receive the deed filed with plaintiff's bill, . . . for the reason that the metes and bounds thereof embrace lands which were not owned by said Totten at the time of said sale. Defendant prays that the true quantity so owned by said Totten, and the metes and bounds thereof, be ascertained by proper proceedings herein, and that a deed be required herein from said Totten to defendant, setting forth and embracing the true quantity and the true metes and bounds of said land so owned by said Totten at the time of his sale to defendant."

On the eighteenth day of February the court entered an order referring the cause to a commissioner to ascertain and report what amount of purchase-money in the bill mentioned has been paid on the land therein mentioned, and to whom; to ascertain and report whether the deed filed with the bill as exhibit C embraces land not owned by the defendant W. G. L. Totten at the time of his sale to defendant Morgan Morgan; to ascertain and report, further, the true quantity of land owned by said Totten in the tract sold by him to Morgan Morgan; and to ascertain the true metes and bounds thereof. And to

this end the commissioner may direct the surveyor of lands of this county to go on said land, and land contiguous thereto, and do such surveying as any of the parties in this suit may require, with the view of ascertaining the true quantity and boundary of said land; and for this purpose said surveyor shall, if required by any of the parties to this suit, go to the beginning corner of what is known as the Davenport survey, and any other of the corners and lines thereof, and do such surveying as may be required, etc.

The surveyor did go on the land, and under the instructions given him, did his work thoroughly. His map shows the Davenport survey, and how different lots are located with reference to each other. The black lines bounding lot 14 show the original survey of that lot, and its relation in the block to the surrounding lots. The evidence shows that after Crites had bought lot 14, by the description of "lot 14 in the Davenport survey," he, in 1859, had it surveyed by one Aaron D. Peterson, who commenced at a mistaken corner of lot 14, and surveyed the same, as he supposed. Lot 14 is bounded on the top or north by lot 13, on the right or east by lot 23, on the bottom or south by lot 15, and on the left or west by lot 11. On the north, in the block of lots, on the east of 13 is 24, and on the west is 12. By Peterson's survey, commencing as he did, at what he evidently supposed was a corner of lot 14 in the Davenport survey, he left out a small strip of land on the south which went into 15; also left out a strip on the west which went into 11; and took a part of lot 13 on the north, and thus created an interlock. He also included a part of lot 23, amounting to, as far as this controversy is concerned, twenty-six and one half acres, which creates another interlock; and also includes two acres of lot 24, making still another interlock. James Ross is the owner of that portion of lot 13 which adjoins 14, and Mrs. Ely owns lot 23 on the east. Thus there are made three interlocks. It does not appear who owns lot 24, on which the interlock of the two acres is made. On that portion included in the deed to Totten, and from Totten to Morgan, the interlock with Ross's land makes twenty-three and one half acres; and that with Mrs. Ely's land twenty-six and one half acres; and with lot 24 two acres.

The proof shows that Leonard Crites built a house in about 1850, in the interlock on the north with James Ross's land, and cleared within that interlock fourteen acres, which has been held by Crites, and those claiming under him, contin-

uously from that time to this. There was no improvement, so far as the proof shows, in the two-acre interlock, or the twenty-six-and-one-half-acre interlock on the land of Mrs. Ely. Neither Mrs. Ely, James Ross, nor the owner of lot 24 are defendants to the suit. There is considerable conflict of evidence as to the relative value of the land in the interlocks to the whole land sold. The court, being of opinion that the adverse holding could only include the actual inclosure, held that Morgan could hold the fourteen acres improved land, with house thereon, but that he could not hold the nine and one half, the two, and the twenty-six and one half acres; and decided that the value of said lands must be abated from the purchase-money, and that such value amounted to more than the purchase-money due; and dismissed the bill as to Morgan, with costs, and decreed over in favor of J. W. Heavner, executor of Elias Heavner, deceased, against Totten for the note, with interest and costs; and that Totten should execute a deed to Morgan Morgan as therein directed, which would leave out the said interlock, and run by the black lines, which were the lines of the Davenport survey, except that it should include the fourteen acres so held by prescription. From this decree the executor of Elias Heavner appealed.

It is very clear that if it were proper in this cause to make any decree at all, without other parties before the court, that Morgan would hold the residue of the interlock as against Ross, as well as the fourteen acres, because that nine and one half acres was the residue of the interlock; the party holding actual possession within the interlock of the fourteen acres, and claiming to the extent of his boundary. In *Garrett v. Ramsey*, 26 W. Va. 345, a majority of this court held that where there are conflicting grants or deeds to lands, causing an interlock, and the elder grantee or owner is in the actual possession of his land outside of the interlock, and the junior grantee or adverse claimant is in the actual possession of a part of the interlock, claiming the whole, to the extent of his boundary, such possession of the former outside of the interlock will not limit the possession of the latter to his mere inclosure, but he will be held to be in the adverse possession of all the land in the interlock. The court also, in a case like this, where it is a question of whether the party had title to a part of the land he sold, and the defendant claims an abatement for the loss of land to which he cannot have title, will not fix the average value per acre of the entire tract sold as

the rule for abatement, as was held in *Depue v. Sergeant*, 21 W. Va. 326, where there was no question of title, but a deficiency in the quantity of acres; but in a case like this, the measure of abatement is such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole land: *Butcher v. Peterson*, 26 Id. 447; 53 Am. Rep. 89.

Should the owner of adjoining lands, where the interlocks occurred, have been before the court before a decree was rendered?

In *Yancey v. Lewis*, 4 Hen. & M. 390, it was held that where a purchaser comes into a court of equity for relief against a judgment at law, on the ground of defect in the vendor's title to a part of the tract of land purchased, it is not enough for him to allege such defect as want of title; he must prove an actual eviction, or superior title in some other person. In this case, the defect claimed was in not having a patent for part of the land.

In *Ralston v. Miller*, 3 Rand. 44, 15 Am. Dec. 704, it was held that a court of equity will not interfere to prevent the payment of purchase-money of lands, unless the title to the land is questioned by a suit, either prosecuted or threatened, or unless the purchaser can show clearly that the title is defective. In this case, it does not appear that Davidson, who claimed title to a part of the lot, was made a defendant. Nothing was said in the opinion about parties.

In *Koger v. Kane's Adm'r*, 5 Leigh, 606, it was held that the jurisdiction of a court of equity to enjoin the purchase-money of land after conveyance, executed on the ground of deficiency in quantity, the contract being a sale by the acre, is not now to be questioned; and in Virginia, equity will enjoin the collection of the purchase-money of land, on the grounds of defect of title, after the vendee has taken possession under conveyance from the vendor, with general warranty, if the title is questioned by a suit, either prosecuted or threatened, or if the purchaser can show clearly that the title is defective. There is no statement of the case, and it does not appear whether the party who claimed a part of the land against the purchaser was or was not a party. Tucker, J., in his opinion, says: "In England, if the purchaser has obtained his deed, he can have no redress in equity, but must look to his covenants; and if he has but a covenant of warranty, he can have no redress until eviction. And this principle has received countenance from the decisions of the court of a sister state: *Bum-*

pus v. Planter, 1 Johns. Ch. 213, 218; *Abbott v. Allen*, 2 Id. 519; 7 Am. Dec. 554. But with us, even at a time when there was most rigor in this matter, it was admitted that the party might have relief, provided he could prove an outstanding superior title in a third person: *Yancey v. Lewis*, 4 Hen. & M. 390; *Grantland v. Wight*, 5 Munf. 295. And in *Ralston v. Miller*, 3 Rand. 44, 15 Am. Dec. 704, Judge Green, delivering the opinion, in which the other judges concurred, remarks that this court has, in favor of purchasers, gone far beyond anything which has been sustained by the court of chancery of England or elsewhere in enjoining the payment of purchase-money after the purchaser has taken possession under a conveyance, especially with general warranty. Yet it has never gone so far as to interfere, unless the title was questioned by a suit, either prosecuted or threatened, or unless the purchaser could show clearly that the title was defective. Chancellor Kent seems to have deemed an actual suit pending as sufficient grounds of interference: *Johnson v. Gere*, 2 Johns. Ch. 546. The jurisdiction thus confessedly exercised by the courts of equity with us results from what may be called the preventive justice of these tribunals. It arrests the compulsive payment of the purchase-money when the purchaser can show that there is either a certainty or strong probability that he must lose that for which he is paying his money. It gives him the relief, too, though his demand may be in the nature of unliquidated damages, because he has no other means of ascertaining them. Thus if the purchaser can show that he has received a deed with general warranty, and that the title is bad, yet, if he has not been evicted, he cannot maintain covenant at law and ascertain his damages before that tribunal, in order there to set them off against the demand. If, indeed, there are covenants for good title, etc., it may be otherwise; and so it may often happen that an action may be brought, where there are such covenants of good title, etc., upon which the validity of the title may be tested and the damages of the party ascertained. Whether, in these causes, relief could be given in equity, it is not necessary here to say. But where there is only a covenant of warranty, this cannot be done; and hence I conceive the party would be entitled to the assistance of a court of equity where he is full-handed with proof that his title is defective, although he has not yet been evicted."

In *Clark v. Hardygrove*, 7 Gratt. 399, it was held that where H. sells land to C., and conveys to him with general warranty,

and C. assigns to H. the bonds of S. in payment of the purchase-money, and the title to a part of the land is afterwards discovered to be clearly defective, that C. may enjoin H. from collecting so much of the bond of S. as will compensate him for the land to which the title is defective; that C. is entitled to compensation according to the relative value of the land to which a good title cannot be made. The sale was of 1,176 acres of land for \$11,000. The bill alleges that when the purchaser bought the land and received his deed, he did not know there was any defect in the title to any part of it; that Hardgrove or his vendees never had title to fifty-one acres of the land; that the fifty-one acres was situated in the middle of the tract; that it had been owned by P. Goodwin, who, twenty years before, had devised it to his two daughters, one of whom had married Thomas Whitworth, and the other had married Daniel E. Allen, and had died, leaving an infant daughter. The bill made Allen and his infant daughter, Whitworth and wife, Hardgrave, Scott and his sureties, and others, parties to the bill. No question was here raised as to the parties.

Lovell v. Chilton, 2 W. Va. 410, was an injunction to restrain collection of purchase-money on account of defect in the title to a part of the land, and John C. Bird, who claimed a part of the land, was made a defendant. Maxwell, J., in delivering the opinion of the court, said that "it seems to me, therefore, that the complainant thus made out a case showing clearly that Chilton's title was defective, and was entitled to have the sale of the land enjoined until the title could be settled: *Keyton's Adm'r v. Brawford's Ex'rs*, 5 Leigh, 39; *Ralston v. Miller*, 3 Rand. 44; 15 Am. Dec. 704. But I think the release of Bird of all his title to said land, which Chilton procured and had recorded, was a sufficient settlement of the title to allow the complainant to proceed to collect the purchase-money by sale of the land. There is another charge in the bill,—that the complainant was informed and believed that there were other parties who claimed the land described in Chilton's deed to him, adversely to him; but there is no allegation who the parties are, nor is their title shown or indicated. This allegation is entirely too general to require any attention."

In *Wamsley v. Stalnaker*, 24 W. Va. 214, it is again held that equity will enjoin the collection of the purchase-money of land on the ground of defect of title after the vendee has taken possession under conveyance from the vendor, with general warranty, if the title is questioned by a suit, either prose-

cuted or threatened, or if the purchaser can show clearly that the title is defective. In this case, the injunction was granted on the ground that there were various liens on the lands when the purchaser bought.

In *Kinport v. Rawson*, 29 W. Va. 487, this court held the same as in *Wamsley v. Stalnaker*, *supra*, but held, further, that by the words, "if the title is questioned by a suit, either prosecuted or threatened," is not meant that it is sufficient to allege in the bill that a "suit is threatened" merely, but the bill on its face must allege the grounds upon which the "threatened suit" is based, and which must be such as will put a reasonable man in just apprehension of the loss of his land. It was further held in this cause, in which the bill alleged that Holt and Mathews asserted a claim on the land, that the mere fact that some one has asserted a claim on the land, and the fact was generally known in the community where the land is situated, is insufficient to justify a court of equity in restraining a sale under a trust deed given to secure the purchase-money. Holt and Mathews were made defendants to the bill. Nothing was said in the cause about parties.

Now, in such causes, should the persons who the bill states hold parts of the land by title paramount to that of the vendor be made parties defendant, and bound by the decree? Judge Tucker, as we have seen, in *Koger v. Kane's Adm'r*, 5 Leigh, 608, justifies the departure from the strict rule of the English chancery court, on the ground that it results from what may be called the preventive justice of a court of equity; that where there is simply a covenant of general warranty, the purchaser ought not to be compelled to pay the purchase-money, when he is full-handed with proof that the title is defective. If he is thus to be favored, it is because it would be inequitable that he should pay his purchase-money for a thing he cannot receive. But where is the equity in requiring him, on a case made, to pay his money, and take title to land that is claimed by a third party, when the very next day that third party may sue him in ejectment for the same land, and on the case then made, he loses his land? Equity delights in doing ample and complete justice to all parties; and requires that a third party, claiming to hold the land against the purchaser, should be made a party, and required to show his title and claim, and to be bound by the decree. Justice, it seems to me, requires this.

In this cause, the court has decided that Morgan should

hold fourteen acres of land, because it has been held in possession so long by the vendor, and those under whom he claimed, that he had a title by prescription. Ross was not a party to the suit, and of course is not bound by the decree. He may sue Morgan in ejectment, and recover that fourteen acres, by showing that Crites entered under a lease, and always recognized the right of the owner of lot 13. It is not treating Morgan justly to make him take such a hazard. All the parties are interested in the controversy, and it ought to be settled in one suit, so as to prevent litigation, and do justice between the parties. Ross ought to have been made a defendant; and unless Heavner will give up all claims to the other two interlocks, Mrs. Ely and the owner of lot 24 ought also to be made defendants. When a suit is brought to enforce a vendor's lien, and the answer resists the payment of the purchase-money on the ground that certain portions of the land are claimed and held by certain persons by paramount title, unless such answer shows on its face that *prima facie* the title is defective, it is not sufficient; but if it does show this, the plaintiff cannot reply specially, but must amend his bill, and make all such parties who set up such *bona fide* claims defendants to his bill, and show by his bill, if he can, that his title is clear and valid, and that there is no defect in the title. If he does not intend to insist on title, as against the defendants, or any of them, who are claiming the land, or a part thereof, as shown by the answer, let him say so in his bill, and he need not make such parties defendants; but he will not be permitted to require the defendant, who is the purchaser, to pay for any land to which the said third party appears to have had a good title, but which the court thinks has been lost by adverse possession, unless such third party is a defendant to the suit. If the claim of such third party to the land sold to the vendee is based on such grounds as will put a reasonable man in just apprehension of losing his land, such claimant should be made a defendant to the suit.

The decree of the circuit court of Upshur County is reversed, with costs, and the cause remanded, with leave to the plaintiff to amend his bill as herein indicated, and for further proceedings according to this opinion and the rules of equity.

ABATEMENT IN PURCHASE PRICE for defect of title or quantity of land sold: *Butcher v. Peterson*, 26 W. Va. 447; 53 Am. Rep. 89; *Harrell v. Hall*, 19 Ark. 102; 68 Am. Dec. 202, note 214; *Woodbury v. Luddy*, 14 Allen 1; 92 Am. Dec. 731, and note 736; *Walling v. Kinnard*, 10 Tex. 508; 60 Am. Dec. 216, note 219.

MORAN v. CLARK.

[30 WEST VIRGINIA, 358.]

HOMESTEAD — CONSTITUTIONAL LAW — LEGISLATIVE POWER. — The people, in their constitution, so far as future debts may be affected, have the right to provide for any sort of homestead, guarded as they please; subject to restrictions, or without restrictions; to prohibit the owner of the homestead from encumbering it, or permit it to be done, as, in their wisdom, they see fit. And, if unrestricted by the constitution, the legislature may exercise the same power.

HOMESTEAD — RIGHT TO ENCUMBER. — In the absence of a constitutional or statutory prohibition, as incident to the right of ownership, the owner of the homestead may sell or encumber it, with like effect as if the property had not been set apart as a homestead.

HOMESTEAD — POWER TO ENCUMBER. — If the statute points out any particular mode by which the owner of the homestead may sell or encumber it, to that extent his power over it is restricted; that particular mode must be adopted, otherwise the sale or encumbrance is invalid.

EXEMPTIONS, WAIVER OF, AS TO PERSONAL PROPERTY. — When the constitution or statute is silent, a waiver of a debtor's right to claim personal property as exempt from execution, where attempted to be made by an executory contract, as a clause in a note or contract, "waiving the benefit of all exemption laws," is ineffectual, and will not be enforced.

HOMESTEAD — FORCED SALE, WHAT IS NOT A. — Sale of homestead under a deed of trust, or under a decree of foreclosure of a mortgage thereon, is not a "forced sale," within the meaning of the West Virginia constitution, which exempts a homestead from "forced sale."

HOMESTEAD, CONVEYANCE OF BY TRUST DEED. — Under the West Virginia constitution, and acts of 1872-73, chapter 193, the owner of a homestead set apart under the provisions of that act may execute a valid deed of trust thereon.

JUDICIAL SALES, CONFIRMATION OR VACATION OF. — It is difficult to lay down a general rule by which to determine whether a judicial sale will be confirmed or set aside. The approval or disapproval of such sale rests in the discretion of the court, and depends in a great measure upon the circumstances of each case.

JUDICIAL SALES — SETTING ASIDE — INADEQUACY OF PRICE. — Where there have been two public sales of property, not far apart in time, one under a trust deed, the other a judicial sale, at both of which the property brought the same price, and affidavits are filed, stating that affiants believe that in the near future the property could be sold at an advance of from five hundred to one thousand dollars over the price for which it was sold, and another affidavit states that the property was sold for a fair valuation, the court properly refused to set aside the sale on the ground of mere inadequacy of price.

PLEADING AND PRACTICE. — ERROR NOT PREJUDICIAL to the appellant will not work a reversal of the judgment.

G. E. Price and F. M. Reynolds, for the appellant.

W. C. Clayton and C. W. Dailey, for the appellee.

JOHNSON, President. On the first day of December, 1874, Henry G. Davis and others conveyed to Cornelius Moran lots Nos. 169 and 170 in the town of Keyser, for the sum of \$752.50. In the *habendum* clause in the deed is the following language: "To have and to hold the said lots, with all the appurtenances, unto said C. Moran and his heirs forever, as and for a homestead, exempt from forced sale, according to the provisions of chapter 193 of the acts of the legislature of West Virginia, session of 1872-73." A lien was expressly reserved for \$557.50 of the purchase-money. The following paper was executed on the same day by Cornelius Moran, duly acknowledged on the sixteenth day of December, 1874, and recorded on the twenty-eighth day of the said month, 1874: "Whereas, Henry G. Davis and Kate A., his wife, Thomas B. Davis, and William R. Davis and Mary H., his wife, have this day conveyed unto Cornelius Moran two certain lots in the town of Keyser, Mineral County, West Virginia, by deed bearing even date herewith, for the consideration of \$752.50, and the said Cornelius Moran desires the benefit of a homestead in said lots, therefore this writing witnesseth that the said Cornelius Moran intends to set apart as and for a homestead exempt from forced sale, under and according to the provisions of chapter 193 of the acts of the legislature of West Virginia, session of 1872-73 [here follows a description of the lots]."

On April 2, 1880, Cornelius Moran and Bridget, his wife, executed to W. C. Clayton, trustee, a deed of trust on said homestead property, together with all the household and kitchen furniture, and all the hotel, bar, and ten-pin alley fixtures in the house, to secure a large amount of debts. This deed was properly acknowledged by Moran and wife on the third day of April, 1880, and the same day admitted to record. This deed was by its own terms "subject to the homestead, as this clause shows; . . . but the lots in Keyser above conveyed are subject to the homestead right of C. Moran to the amount of one thousand dollars, as shown by his declaration of homestead duly recorded," etc.

On December 27, 1881, Moran and wife executed another deed of trust to the same trustee, conveying the homestead lots to secure the debt of the defendants Clark and Boyd, amounting then to one thousand dollars. In this deed, we find the following in the granting clause, after describing the two lots: "Together with all the buildings, fences, and other improvements thereon, and all the appurtenances thereunto

belonging; expressly waiving all rights of homestead, and granting and conveying said lots and appurtenances free from any and all rights, reservations, claims, and demands of the said parties of the first part." This deed was properly acknowledged by Moran and wife on the twenty-eighth day of December, 1881, and on the 14th of January, 1882, admitted to record.

On May 10, 1883, the said Moran and wife executed still another deed of trust on said homestead lots and appurtenances to W. C. Clayton, trustee, to secure the payment of a note of one thousand dollars, payable to James Clark & Co. This deed contains the following: "And the homestead right, to the amount of one thousand dollars, set apart by the said C. Moran by his declaration of homestead, recorded in said county of Mineral, in deed book 5, page 190, is hereby waived and set aside, so that this conveyance is wholly free therefrom." This deed was properly acknowledged by Moran and wife on the 10th of May, 1883, and on the same day admitted to record.

The trustee, Clayton, advertised and sold the property, and Cornelius Moran filed his bill in the circuit court of Mineral County at June rules, 1885, in which he set up the foregoing facts, and insisted that he could not encumber and waive his homestead, and also that said property was sold for an inadequate price, and was purchased by the defendant and James Clark. He alleges, also, other reasons for setting aside the deed, and prayed that the court would declare his right to a homestead of one thousand dollars in value in said property, and that the deed be set aside, and declared null and void; and if the court deemed it necessary, that under its decree the property might be sold, and his homestead preserved to him; and for general relief. Answers were filed by Clayton, the trustee, also by defendants Boyd and James Clark, insisting that the sale was proper, and that the homestead was waived by both Moran and wife in the said deeds of trust.

On the 20th of January, 1886, the court decided that Cornelius Moran had the right by deed of trust, in which his wife united, to convey his right of homestead in the said property, and that the homestead, by said deed, passed to the trustee, and that the court could not set aside the deed, on the ground that the property had theretofore been set apart as a homestead; and as to the other grounds, the cause was continued. On the third day of May, 1886, by another decree, the deed was set aside and annulled, the defendant and grantee Clark

agreeing that it should be set aside; and the court ordered the property to be sold, free from any right of homestead in the said Moran. The property was sold by the commissioners appointed by said decree to said Clark, for the price of two thousand dollars, the same for which it had sold under the trust deed. The defendant excepted to the confirmation of the sale, on the ground of inadequacy of price, and in support of his exception filed the joint affidavit of eleven persons, who say that they are acquainted with the property, and in their opinion the property was worth from three thousand dollars to three thousand five hundred dollars; "that property in Keyser is beginning to advance in price, in consequence of the building of the new Piedmont and Cumberland railroad, and affiants believe that in the near future said property can be sold for an advance of from five hundred dollars to one thousand dollars over the price at which it was sold to James Clark." Three of the affiants value the property at three thousand dollars. The affidavit of J. H. Markwood shows that affiant believed that two thousand dollars was a fair price for the property.

On September 18, 1886, the court entered a final decree in the cause, in which the affidavits were considered, and in open court James Clark offered to increase his bid to two thousand five hundred dollars, after the court had indicated that in its opinion the price was low. Clark's offer was accepted, and the sale confirmed to him at two thousand five hundred dollars. Moran thereupon moved the court to set aside out of said purchase-money one thousand dollars as his claim of homestead in said property, to be disposed of or invested for his benefit in such way as the court might direct, which motion the court refused to grant, and proceeded to order the proceeds of the sale to be distributed, and further ordered that "if the plaintiff, or some one for him, shall, within twenty days from this date, give to said special commissioner a bond with good security in the penalty of \$200, with condition that on a resale of said property it shall sell for \$2,750, or the parties to the said bond will pay the sum of \$200, then the said commissioner shall resell the said property on the same terms and after the same advertisement as before; otherwise the said sale shall stand confirmed."

From the decrees of the 20th of January, 1886, and the 18th of September, 1886, the plaintiff Moran appealed. Appeal granted on November 6, 1886.

The principal question to be decided in this cause is whether the deeds of trusts from Moran and wife, conveying the property set apart as a homestead, are valid. It is insisted by counsel for appellant that said deeds are void, that they had no right, and were not authorized, to so encumber the homestead. They undoubtedly had the right, as we shall see, to thus create liens on the homestead, unless prohibited by the constitution, or statute made in pursuance of the constitution. It is a rule that exemption laws are to be construed favorably towards the debtor, to advance the object of the constitution and statute in their favor: *Kimpton v. Bronson*, 45 Barb. 632; *Becker v. Becker*, 47 Id. 499. The law seems to be well settled that a waiver of a debtor's right to claim personal property as exempt from execution, when attempted to be made by an executory contract, is ineffectual, and will not be enforced. Therefore a clause added to a promissory note "waiving the benefit of all exemption laws" is contrary to public policy, and void: *Kneettle v. Newcomb*, 22 N. Y. 249; 78 Am. Dec. 186; *Recht v. Kelly*, 82 Ill. 147; 25 Am. Rep. 301; *Carter's Adm'r v. Carter*, 20 Fla. 558; 51 Am. Rep. 618; *Branch v. Tomlinson*, 77 N. C. 388; *Curtis v. O'Brien*, 20 Iowa, 376; 89 Am. Dec. 543; *Maxwell v. Reed*, 7 Wis. 582; *Stafford v. Elliott*, 59 Ga. 837; *Denny v. White*, 2 Cold. 284; 88 Am. Dec. 596; *Phelps v. Phelps*, 72 Ill. 445; 22 Am. Rep. 149; *Moxley v. Ragan*, 10 Bush, 156; 19 Am. Rep. 61.

In *Kneettle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186, Denio, J., said: "I am of opinion that a person contracting a debt cannot agree with the creditor that in case of non-payment he shall be entitled to levy his execution upon property exempt from levy by the general laws of the state. The statutes which allow a debtor, being a householder, and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon views of policy and humanity, which would be frustrated if an agreement like that contained in these notes, entered into in connection with the principal contract, could be sustained. A few words contained in any note or obligation would operate to change the law between these parties, and so far disappoint the intentions of the legislature. If effect shall be given to such provisions, it is likely that they will be generally inserted in obligations for small demands, and in that way the policy of the law will be completely overthrown. Every honest man who contracts a

debt expects to pay it, and believes he will be able to do so without having his property sold on execution. No one worthy to be trusted would therefore be apt to object to a clause subjecting all his property to a levy on execution in case of non-payment. It was against the consequences of this overconfidence, and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the legislature has undertaken to interpose. . . . One may turn out his last cow on execution, or may release an equity of redemption, and he will be bound by the act. In thus discriminating, the law takes notice of the readiness with which sanguine and incautious men will make improvident contracts, which look to the future for their consummation, when, if the results were to be presently realized, they would not enter into them at all. If, with the consequences immediately before them, they will do the act, they will not generally be allowed to retract; it being supposed, in such cases, that valid reasons for the transaction may have existed, and that, at all events, the party was not under the influence of the illusion which distance of time creates. Ordinarily, men are held to their executory as well as their executed contracts; but in a few exceptional cases, where the temptation is great, or the consequences peculiarly inconvenient, parties are not allowed to make valid prospective agreements."

In *Carter's Adm'r v. Carter*, 20 Fla. 569, 51 Am. Rep. 618, the court, by Randall, C. J., said: "We have been unable to find in reports, text-books, or digests, that it has been held anywhere, except in Pennsylvania, that a written agreement, contained in a note, to waive the right to claim an exemption of personal property from levy and sale to satisfy a judgment rendered on the note, has been sustained; and even in that state the court has expressed regret that a contract of that kind has ever been sustained, and that such a rule had become established as a law by the repetition of a bad precedent. True, a man may sell his personal property, or may pledge or mortgage it, but in that case the property sold or pledged is designated and identified, and a special interest is created in favor of a creditor in the particular article pledged or mortgaged; and in no state is this power of the owner of personalty denied." He says, further, that "the object of exemption laws is to protect people of limited means, and their families, in the enjoyment of so much property as may

be necessary to prevent absolute pauperism and want, and against the consequences of ill-advised promises, which their lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasion of others. . . . When a man executes a mortgage or bill of sale upon certain specified property, the very nature of the transaction implies the exercise of discretion, and the contemplation of inevitable consequences. Such contracts are therefore upheld, as well in respect to real as to personal property."

In *Recht v. Kelly*, 82 Ill. 147, 25 Am. Rep. 301, the court said, after citing a number of authorities: "The principle of the cases is, that the exemption created by the statute is as much for the benefit of the family of the debtor as for himself, and for that reason he cannot, by an executory contract, waive the provisions made by law for their support and maintenance. Such contracts contravene the policy of the law, and hence are inoperative and void. The owner may, if he choose, sell or otherwise dispose of any property he may have, however much his family may need it; but the law will not aid him in that regard, or permit him to contract in advance that his creditors may use the process of the courts to deprive his family of its benefit and use when an exemption has been created in his favor. Laws enacted from considerations of public concern, and to subserve the general welfare, cannot be abrogated by mere private agreement."

In *Reed v. Union Bank*, 29 Gratt. 719, it was held that the act (Code 1873, c. 183, sec. 3) which authorizes the waiver of the homestead exemption is not in conflict with the eleventh article of the constitution of the state; and if a party executing his bond or note waives his homestead exemption as to the bond or note, neither he nor his wife can set up said homestead exemption as against the said bond or note. The statute under which this decision was made declared that in "all cases where a debtor or contractor shall declare in the body of the bond, note, or other evidence of the debt or contract, that he waives, as to such debt or contract, the exemption from liability of the property which he may be entitled to hold exempt under the provisions of this act, the property, whether previously set apart or not, shall then be liable to be subjected for such debt or contract, under legal process, in like manner and to the same extent as other estate of said debtor and contractor. . . . The following or equivalent words shall

be sufficient to operate as a waiver provided for in the previous section: 'I (or we) hereby waive the benefit of my (or our) homestead exemption as to this debt (obligation or contract, as the case may be).'

Christian, J., said: "If this provision of the statute is constitutional, the waiver can be enforced." The court held the act constitutional. This decision is in no wise in conflict with the other decision we have cited, because we have express authority conferred by the legislature to make the waiver.

Bowman v. Smiley, 31 Pa. St. 225, 72 Am. Dec. 738, is a case in conflict with the decisions above cited. There it was held on the broadest grounds, without any statutory authority, that a debtor may waive his statutory privilege of exemption from execution of a portion of his property; that waiver of exemption from execution, made at the time the debt is created, is based on the same consideration as that on which rests the liability to pay, and is irrevocable. The waiver in this case was in the body of the judgment on which the execution issued, from the levy of which the debtor sought to have the property relieved. The opinion was delivered by Strong, J., in 1858, and no case is cited in the opinion.

But in *Firmstone v. Mack*, 49 Pa. St. 387, 88 Am. Dec. 507, the same court expressly held that an agreement of a laborer to waive the proviso of the statute exempting wages from attachment, embodied in a note signed by him, is void. In this case Woodward, C. J., said: "Without any very great refinement, distinction may be taken between the acts of 1849, and this proviso in the acts of 1845; but still it is the popular and perhaps the fairest mode to regard them both as exemption statutes, which confer upon the debtor an option. That he may waive this option under the act of 1849, not only results out of the nature of the thing, but has been expressly declared in many cases,—in some, however, with regrets expressed that we did not set out with a different construction, and hold the privilege or option indefeasible. If it were *res integra*,—if with the experience and observation we have had we were now for the first to pass upon the question whether debtors could waive their rights under the act of 1849, or widows theirs under the act of the 14th of April, 1851,—we would be very likely to deny it altogether, and stick to the statutes as they are written. And here we have a new case. We have never decided that a debtor may repeal the proviso in the act of 1845, and public policy pleads strongly against such decision. If we

make it, we bring on the litigation which has sprung out of our decisions upon the act of 1849,—the inconvenience to employers before adverted to, and the temptations to weak debtors to beggar their families in the behalf of sharp and grasping creditors. We will not therefore strain the proviso to fit it to our construction of the exemption statutes, but will leave it to its natural operation as it is expressed. The legislature having said that justices shall not attach wages, we will say they shall not, though a particular debtor has said they may. . . . We think, on the whole, that our duty will be performed by declaring the agreement to waive the proviso void."

It is apparent that there is no serious conflict of decisions on the proposition that where the statute provides for the exemption of property, that a debtor cannot, by a mere executory contract, bind himself to waive the benefit of the statute. From this it is argued that when such exemptions are provided for by statute, that the debtor cannot, even when there is no statute forbidding it, encumber by lien either his personal property or his homestead set apart by him, so as to deprive him from claiming the benefit of the exemption. This is a very different proposition from the other. We have seen that in several of the decisions we have cited the distinction is made; and while they hold that he cannot in advance by executing a contract bind himself in the note or other contract to waive the exemption as to such note or contract, yet he may pledge specific property for a debt, and it will not then be exempt from the pledge under the exemption statute. The general rule clearly and distinctly settled is, that in the absence of constitutional or statutory prohibition, a debtor may sell or mortgage his property to him set apart as a homestead: *Jones v. Yoakam*, 5 Neb. 265; *In re Cross*, 2 Dill. 320; *Smith v. Mallone*, 10 S. C. 39; *Gee v. Moore*, 14 Cal. 472; *Rector v. Rotton*, 3 Neb. 171; *Gaines v. Casey*, 10 Bush, 92; *Godfrey v. Thornton*, 46 Wis. 677; *Jordan v. Peak*, 38 Tex. 429; *Brame v. Craig*, 12 Bush, 404; *Smith v. Marc*, 26 Ill. 150; *Stewart v. Mackey*, 16 Tex. 56; 67 Am. Dec. 609.

In the case above cited from 2 Dillon, 320 (*In re Cross*), it was held that under the statute of Nebraska the husband and wife may make a valid mortgage of the homestead property; and that an express waiver of the homestead right is not essential to the validity of such mortgage. Dillon, J., after quoting the statute which provides for the exemption of the homestead property, says: "There is no provision in the stat-

ute prohibiting the alienation, sale, or mortgage of the homestead, or of any of the other property exempted by the statute, from judicial sale; nor is there any provision respecting the mode of conveying the homestead; but there are general provisions relating to the manner of conveying real property, in conformity with which the mortgage here in question was executed. Under these circumstances, I perceive no difficulty in the question here presented. The legal title to the lots occupied as a homestead being in the husband, he and his wife, by joining in an absolute conveyance thereof, might undoubtedly make to the purchaser a perfect title. There being no restriction on the right of disposition, I think it equally clear that they could in this mode make a valid mortgage upon the homestead."

In *Bank of Louisiana v. Lyon*, 52 Miss. 181, Simrall, C. J., quoted the statute as follows: "That it shall not be lawful for a married man to sell or otherwise dispose of his homestead without the consent of his wife; and no deed of conveyance from the husband for the homestead shall be valid, unless the wife join in such conveyance." He also quoted another section, and said: "These sections lay down a mode by which the debtor may have allotted to him his homestead, and also what shall be done if the premises cannot be divided so as to give the debtor what will not exceed two thousand dollars in value. In any event, that seems to be the *ultimatum* that the law subtracts from the debtor's property for his benefit. . . . The prohibition applies to no more of his property than what the law has defined to be his homestead. As to all the residue of his real estate, his power of sale and disposition is not abridged by the act of April 18, 1873, although that residue may be parcel of the rural plantation and residence, or the town or city residence. . . . The conveyance of Lyons to Harvey and Shackleford was of no validity to the extent of two thousand dollars in value of the exemption in the premises which constitutes the debtor's family residence; but as to the excess it was a valid encumbrance on the property." This was a simple deed of trust, in which the wife did not join. This case recognizes the general rule as we have stated it; and still another rule: that where a statute points out a certain mode in which the homestead may be encumbered, or declares that no encumbrance shall be put upon it without certain things being done, that mode alone must be followed, or the attempted lien does not attach to the property: *Boyd v. Cud-*

derback, 31 Ill. 113; *Richards v. Chase*, 2 Gray, 383; *Wing v. Cropper*, 35 Ill. 256.

The constitution of Nevada provides: "A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the consent of husband and wife, when that relation exists; . . . provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife; and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated." In March, 1865, the legislature passed the act declaring that "no mortgage or alienation of any kind, made for the purpose of securing a loan or indebtedness upon the homestead property, shall be valid for any purpose whatsoever." The court said: "The legislature exceeded its power in passing the law in question, for it has said therein that these provisions of exemption should apply to a lien created by husband and wife, which the constitution has expressly said it shall not": *Dunker v. Chedic*, 4 Nev. 378.

Article 7, section 1, constitution of Georgia, adopted in 1868, is as follows: "Each head of a family, or guardian or trustee of a family of minor children, shall be entitled to a homestead of realty to the value of two thousand dollars in specie, and personal property to the value of one thousand dollars in specie, both to be valued at the time they are set apart; and no court or ministerial officer in this state shall ever have jurisdiction or authority to enforce any judgment, decree, or execution against said property so set apart, including such improvements as may be made thereon from time to time, except for taxes, money borrowed and expended in the improvement of the homestead, or for the purchase-money of the same, and for labor done thereon, or material furnished therefor, or removal of encumbrances thereon. And it shall be the duty of the general assembly, as early as practicable, to provide by law for the setting apart and valuation of said property, and to enact laws for the full and complete protection and security of the same to the sole use and benefit of said families as aforesaid." In 1868, the legislature passed an act, one provision of which declared, of the property set apart as a homestead: "Said property so set apart cannot be encumbered or aliened by the husband; but if the same be encumbered and sold by him and his wife jointly, or if they, with the approval of the

ordinary for the time being, indorsed on the encumbrance or deed, said encumbrance or deed shall be as valid as if said property had never been so set apart." In 1876, the supreme court of Georgia held that "after a homestead has been claimed and set apart, it cannot be encumbered by mortgage except for the objects specified in the constitution. A mortgage on the homestead, executed by husband and wife, and approved by the ordinary, which purports to be made to secure a debt for money borrowed, 'to enable us to carry on our farming interests on our farm in Jones County, our present homestead,' cannot be foreclosed if the truth be that the 'mortgage was not given for taxes, or for money borrowed and expended in the improvements on the homestead, or for the purchase-money of the same, or for labor due thereon, or material furnished therefor, or the removal of encumbrances thereon.' It was error to strike out the wife's plea setting up this defense in resistance to foreclosure." It does not appear when the mortgage was executed, and no statute was cited by the judge in his very short opinion of but a few sentences. Bleckly, J., said: "The wife's plea negatives expressly all the objects for which the homestead can be encumbered under the constitution of 1868: Code, sec. 5135 [which is the constitutional provision]. Assuming the plea to be true, the mortgage cannot be enforced against the property while the homestead right is in existence." If the statute which I have quoted, which is found in the Georgia code of 1873, was in force when the mortgage was executed, this is a decision that such statute was unconstitutional.

In *Van Wickle v. Landry*, 29 La. Ann. 330, it was held that "a mortgage on property exempt under the homestead act cannot be enforced, and the owner of such property may sell the same free from the mortgage he has imposed on it." The suit was upon a promissory note of defendant, the payment of which was secured by a mortgage on a tract of land containing about sixty-seven acres. The plaintiff asked payment for the amount of the note and interest, and for the recognition and enforcement of the mortgage. The defendant admitted the execution of the note and mortgage, but denied that the mortgage could be recognized or enforced, because the property was exempt from seizure by the provision of the homestead act of 1865. Manning, C. J., said: "If this were a *nova quæstio* in this court, whether the execution of a mortgage by a debtor is not of itself a waiver of the exemption of

the property mortgaged, we should be inclined to give to this deliberate act of the mortgagor a significance and effect in keeping with the express declaration of the mortgagee; but the scope and effect of the act providing for the exemption has been too often adjudicated by this court to permit its consideration as an original proposition, and it is in deference to the doctrine of *stare decisis* that we adhere to the ruling already made."

In the case of *Lanahan v. Sears*, 102 U. S. 318, it was held that where a party, on receiving an absolute deed, covenants with his grantor to reconvey the lands when the money which it was given to secure shall be paid, both instruments must be taken together as constituting a mortgage; and further, that the mortgagee of a homestead in Texas cannot maintain ejectment therefor if the "forced sale" thereof be prohibited by the constitution of the state which was in force at the date of the mortgage. This was an appeal from the circuit court of the United States for the western district of Texas. Section 15, article 12, of the constitution of Texas, adopted in 1868, is as follows: "The legislature shall have power, and it shall be their duty, to protect by law from forced sale a portion of the property of all heads of families. The homestead of a family, not to exceed two hundred acres of land, not included in a city, town, or village, or any city, town, or village lot or lots not to exceed five thousand dollars in value at the time of their designation as a homestead, and without reference to the value of any improvements thereon, shall not be subject to forced sale for debts, except they be for the purchase-money thereof, for the taxes assessed thereon, or for labor and material expended thereon; nor shall the owner, if a married man, be at liberty to alienate the same, unless by the consent of the wife, and in such manner as may be prescribed by law." The circuit court overruled a demurrer to the injunction bill, and, the defendant declining to answer, the court decreed in favor of the complainants.

Mr. Justice Field, who delivered the opinion of the court, after referring to the constitutional provision, said: "The premises in question, therefore, could not be sold under any decree in a suit for the foreclosure of the mortgage. The prohibition of the constitution extended to any species of compulsory disposition of the homestead, whether denominated a sale or otherwise. A similar prohibition in the constitution of 1845 was so construed by the supreme court of the state in

Sampson v. Williamson, 6 Tex. 101; 55 Am. Dec. 762. In that case, Chief Justice Hemphill said that 'the constitution obviously intended that the homestead should be exempted from the operation of any species of execution, or any forced disposition of the property, whether partial or total, which would disturb the family in the quiet and uninterrupted possession of their home, with the property thereto attached. The beneficence of the provision has a much wider range than to protect the family from a sale which would utterly extinguish all right in the property. It shields them also from deliveries of the property, or from any forcible appropriations of its rents, issues, and profits. It protects the domestic sanctity from every species of intrusion which, under color of law, would subject the property by any disposition whatever to the payment of debts.' The appellant is the owner of the mortgage in this case, and, aware—so states his counsel—that he could not enforce it against the homestead in the state courts, as these mortgages can only be enforced by a decree of sale, commenced an action of ejectment for the premises in the circuit court of the United States, contending that the mortgage passed the legal title as against the mortgagors, and that, as its owner, he had a right to recover the possession of the premises for default in the payment of the notes secured. He sought, in other words, to get around the state constitution by the form of his procedure in the federal court. We do not think that its wise and beneficent purpose of securing a home to the family against the vicissitudes of fortune can be thus easily frustrated. A forced dispossession in ejectment is as much within the prohibition as a forced sale under judicial process." The enjoining the action of ejectment was accordingly affirmed.

The supreme court, in this cause, but does what it always had done,—recognized the construction which the court of last resort in a state puts upon its own constitution. It here recognized the distinction made by the supreme court of Texas, that a sale under a decree of foreclosure was a "forced sale," within the meaning of the constitutional provision, and inhibited by it. But the very case cited by Mr. Justice Field (*Sampson v. Williamson*, 6 Tex. 101, 55 Am. Dec. 762) makes a distinction, which, to my mind, is more fanciful than real, between a mortgage with no power to sell and a mortgage or deed of trust with power therein to sell the premises. A sale under a decree of foreclosure, the court says, is a "forced

sale"; while the sale by an individual under the power given by the instrument is not. In the case in 6 Texas, it was held that a forced sale is one which is made under the process of the court, and in the mode prescribed by law. Therefore the homestead which is exempted by the constitution from "forced sale" cannot be sold under the process of the court; and it matters not what form the contract assumes, nor how willing the head of the family may be, it is an immunity conferred by the constitution for purposes beyond the mere pleasure of the individual, and cannot be renounced. It further holds that a general power of alienation includes the power to mortgage; that the head of a family, if a married man, with the assent of his wife, in the form prescribed by law, may make an absolute sale of the homestead, or may mortgage it, with a power of sale by the mortgagee on default of payment. A mortgage depending for its enforcement on judicial process would be ineffectual, because a sale under such process would be "forced"; but a sale under a power in a mortgagee or trustee would not be a "forced sale."

In *Black v. Rockmore*, 50 Tex. 95, the court, by Bonner, J., said: "As an abstract proposition, it would seem to accord fully with justice that both the husband and wife, and their estate, should be bound by an express agreement, entered into with all the formalities of law, to make the homestead a security for an indebtedness, created, perhaps, upon the very faith of this security. Such contracts, when coupled with a power of sale, have been repeatedly held valid if executed in the lifetime of the husband: *Jordan v. Peak*, 38 Id. 429. As limitation was placed upon the power to encumber the homestead, it is, perhaps, to be regretted that the distinction first intimated in the case of *Sampson v. Williamson*, 6 Id. 102, 55 Am. Dec. 762, has obtained by subsequent decisions approving it, which discriminated against this power when sought to be enforced under the safeguards of judicial process, and in favor of it when executed by the unrestrained will of a trustee, who is generally the beneficiary in the trust."

In *Wing v. Cropper*, 35 Ill. 256, it was held that a sale by a decree of a court of equity, in a suit to foreclose a mortgage, under an order to the master to make the sale, is a forced sale, as much so as if the sale were made under a *feri facias*; that such a case is distinguishable from the cases of *Smith v. Marc*, *supra*, and *Ely v. Eastwood*, 26 Ill. 108, where the sales were

made under a power to sell, and not by the order or decree of any court.

In *Peterson v. Hornblower*, 33 Cal. 266, the court holds that the phrase "forced sale," as used in article 11, section 15, of the constitution, which provides that the "legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families," and where used in the several statutes passed in pursuance of this constitutional requirement, is not synonymous with "sale on execution," etc., but means a sale against the will of the owner, and does not apply where the owner consents directly to the sale, or does so indirectly, by consenting to or doing those acts or things that necessarily or usually eventuate in a sale; as, for instance, a sale under a power contained in a mortgage, or a decree of foreclosure. This decision is in accord with the current of authority; nearly all cases so hold, and it seems to us with reason. It is hard to see how a sale can be called "forced" where one consents, either directly or indirectly, that it shall be made, and in the very instrument in which the lien is created. He does it directly when he executes a power of sale, and he does so indirectly when he does that which at the time was intended in a certain contingency should eventuate in a sale of the property.

In *White v. Owen*, 30 Gratt. 43, it was decided that a deed of trust to secure a debt executed by the grantor and his wife, conveying real and personal property which had been previously set apart by the husband as his homestead, has priority over the homestead exemption, and the said property may be subjected to satisfy the debt. The constitution of Virginia provides that every householder or head of a family shall be entitled to hold his property, to be selected by him, not exceeding the value of two thousand dollars, in addition to what is exempted by the poor-laws, "exempt from levy, seizure, garnishing, or sale under any execution, order, or other process." Another section of the same article declares: "Nothing contained in this article shall be construed to interfere with the sale of the property aforesaid, or any part thereof, by virtue of any mortgage, deed of trust, pledge, or other security thereon." The legislature passed an act as to homesteads, and, among other things, provided that the homestead so set apart "shall not be mortgaged, encumbered, or aliened by the owner, if a married man, except by the joint deed of himself and wife, executed and acknowledged after

the manner of conveyance of lands of a married woman." While Anderson, J., said the legislature had gone beyond the requirements of the constitution in the restriction, it seems that point was not involved in the case, as husband and wife united in the deed as provided by the statute.

Mr. Freeman, in his note to *Poole v. Gerrard*, 65 Am. Dec. 482, has well and forcibly said: "The law of homestead is so entirely statutory, and the statutes of different states concerning it are so various, and so often amended, that it is difficult to formulate any general principles or rules relating to any branch of the subject. There is, however, a fair degree of uniformity of statutory and case law upon the general subject of conveyance of homesteads. . . . The power of alienation is not derived from the statute relating to alienation of homesteads. It is an incident of the ownership of the property, independent of the homestead law; and the directions and prohibition of the statute as to the alienation are mere restrictions upon this antecedent power. Without any such restriction, the property passes by a conveyance as if there were no homestead. No express waiver of the homestead is essential, unless the statute requires it, because the property having passed by the conveyance, the homestead necessarily ceases."

From our investigation of this interesting subject, these propositions are naturally deduced: That the people in their constitution, as far as future debts may affect it, have the right to provide for any sort of a homestead guarded as they please, subject to restrictions, or without restrictions, to prohibit the owner of the homestead from encumbering it, or to permit it to be done as in their wisdom they may see fit. That, unrestricted by the constitution, the legislature may exercise the same power. That where there is neither constitutional nor statutory prohibition as incident to the right of ownership, the owner of the homestead may sell or encumber it; and such sale or encumbrance will be as valid as if the property had not been set apart as a homestead. That if the statute points out any particular mode by which the owner of the homestead may sell or encumber it, to that extent his power over it is restricted; that particular mode must be adopted, or the sale or encumbrance is invalid. That where the constitution or statute is silent on the subject, a waiver of a debtor's right to claim personal property as exempt from execution, where attempted to be made by an

executory contract as a clause in a note or contract, "waiving the benefit of all exemption laws," is ineffectual, and will not be enforced. That the sale of the homestead under a deed of trust, or under a decree of foreclosure of a mortgagee thereon, is not a "forced sale," within the meaning of the constitution which exempts a homestead from "forced sale."

We will now examine our own constitutional and statutory provisions as to the subject, and see if, under these principles, the deeds of trust are valid or otherwise. Section 48, article 6, of the constitution of 1872, provides that "any husband or parent residing in this state, or the infant children of deceased parents, may hold a homestead of the value of one thousand dollars, and personal property to the value of two hundred dollars, exempt from forced sale, subject to such regulations as shall be prescribed by law; provided that such homestead exemption shall in no wise affect debts or liabilities existing at the time of the adoption of this constitution; and provided further, that no property shall be exempt from sale for taxes due thereon, or for the payment of purchase-money due upon said property, or for debts contracted for the erection of improvements thereon." In *Speidel v. Schlosser*, 13 W. Va. 686, a majority of this court held that this section of the constitution does not, *ex proprio vigore*, confer a right to a homestead. It simply imposed on the legislature the duty to pass an act whereby a homestead of not less than one thousand dollars might be claimed by any husband or parent residing in this state, or the infant children of deceased parents, which should be free from forced sale for debts or liabilities other than those named in the said section 48, as deemed proper by the legislature. The same point was decided in *Holt v. Williams*, 13 W. Va. 704. Here is clearly no countenance given to the idea that it was the design of the constitution to take away the dominion that the owner himself had over his property, and to deny him the right to sell or encumber the homestead. It gave him the right to hold, as exempt from "forced sale," a homestead of the value of one thousand dollars, under such regulations as might be prescribed by law, but did not deny to him the right to dispose of the homestead as he chose. It was a privilege secured to him, but not putting his property beyond his control. It did not evince a public policy that it was necessary that one thousand dollars of his property should be set apart for the use of his family beyond his own control over it. This court, in *Donaldson v. Voltz*, 19 W. Va. 156, held

that section 6, chapter 193, Code 1872-73, so far as it excepts from the benefit of the exemption from execution debts due for rent, is in violation of section 48, article 6, of the constitution. If the legislature did its duty, and put in force the forty-eighth section of article 6 of the constitution, they must of course be governed by its provisions, and not provide for exceptions to the right of exemption not specified in the constitution.

The first homestead act under this constitution is chapter 193, acts 1872-73, which provides, by section 9, that "any husband or parent, desiring to obtain the benefit of such homestead, shall make a declaration of such intention, and therein describe, with convenient certainty, such homestead, so that it may be distinguished from other property. If such husband or parent should die before making and recording a declaration of such intention, the same may be made by the widow, guardian of the infant children, or some person appointed by the circuit court or county court of the county for that purpose; which declaration of such intention shall be acknowledged before some officer authorized to take acknowledgment of deeds for record, which the party shall have duly recorded in the clerk's office of the county court of the county in which such homestead is situated, in a book to be kept for the purpose." All this was done in this case.

Section 11 provides that "any such husband or parent, except a married woman, at the time of contracting the debt, may in writing waive the right to claim the benefit of such homestead as to such debt; provided, in the case of a husband, his wife shall join him in such waiver, and their acknowledgment, and her privy examination, be taken and recorded as provided for in case of deeds of conveyance." It is argued from this right being conferred, that it is the only mode in which they could agree that the homestead should be encumbered. But we have seen, where the statute is silent on the subject, that the courts have generally held that no such waiver could be in advance made by an executory contract. This the legislature knew, and by this statute authorized it to be done. But in this statute is indicated no intention to deprive the owner of the homestead from selling it, or executing a deed of trust on it. It was under this act (chapter 193) that the homestead in this cause was set apart, and of course this is the law that must govern it. Whether a subsequent legislature could make it subject to debts, or change it in any

way, the right of the owner to have entire control over it by selling or encumbering it does not arise in this case, as it was not attempted.

The next act on the subject is chapter 114, acts of 1877, in which, in section 3, occurs this language: "But nothing herein contained shall affect or impair any right acquired under chapter 193 of the acts of 1872-73." In this act the manner of setting apart the homestead is different. In this act is no repealing clause, nor is there any attempt to restrain the owner in his control over the homestead.

The last act on the subject is chapter 19, acts of 1881: Warth's Code, c. 41. In section 32 of this chapter, it is provided: "But nothing herein contained shall affect or impair any right acquired under chapter 193 of the acts of 1872-73." In this act, in section 33, it is provided that if the value of the homestead was more than the sum of one thousand dollars at the time it was set apart, or by reason of permanent improvements put upon it after it was set apart, a creditor could file his bill to subject the excess to his claim. Section 34 provides that, "in the case of the death of a husband or parent owning such homestead, the benefit thereof shall descend to his minor children, and shall be held and enjoyed by them as such homestead until all of the said infants attain the age of twenty-one years, unless they sooner die." There is nothing in the act except said section 34 restricting the right of the owner over said homestead, even if that does so, and nothing said about his right to waive the exemption or encumber the estate. What the effect of this statute will be on the owner's right to execute a deed of trust on such a homestead does not here arise, as this statute does not control the homestead sought to be exempted in this case. The act of 1872-73 controls this case; and, as we have before seen, it left the owner free to encumber his homestead if he chose to do so. Both the deeds of trust are valid, as the grantors therein had full power to execute them.

But it is insisted that the court erred in refusing to set aside the sale. Affidavits were filed in support of the motion to set aside the sale, because it was claimed the property sold for an inadequate price, and thereupon the purchaser offered to let the report of the sale be corrected, and the property reported as sold to him for two thousand five hundred dollars. This the court did, and the sale was confirmed to Clark at two thousand five hundred dollars. The affidavits for the owner stated

that "affiants believe that in the near future that the said property can be sold for an advance of from five hundred to one thousand dollars over the price it was sold to James Clark." Clark at once offered the five hundred dollars advance, and the court accepted it. The affiants did not say that at the time it was sold it would have brought two thousand five hundred dollars or three thousand dollars, but they believe that it would in the near future bring that price. In *Kable v. Mitchell*, 9 W. Va. 492, it was held that the court may, in the exercise of a sound discretion, either affirm or set aside the sale, where, from the facts, evidence, and circumstances before it, it appears clearly that the sale was made at a grossly inadequate price; and the court may solve the question upon affidavits or depositions in connection with the fact that a greatly larger price is offered to the court for the land, and secured, or offered to be secured; or it may set the sale aside upon any evidence or fact or facts before it which clearly shows that the land sold at a greatly inadequate price. See also *Hilleary v. Thompson*, 11 W. Va. 113; *Hartley v. Roffe*, 12 Id. 401; *Beaty v. Veon*, 18 Id. 291.

In *Trimble v. Herold*, 20 W. Va. 602, it was held that this court will not set aside a sale of land made by a commissioner, on the ground of inadequacy of price, when there had been four sales of the land, three of which had been set aside,—the first, for inadequacy of price; the second, because of a cloud upon the title; and the third, on an upset bid. It is difficult to lay down any rule applicable to all cases; and whether a court will confirm a sale made by a commissioner under its decree must, in a great measure, depend upon the circumstances of each case: *Hartley v. Roffe*, 12 W. Va. 404.

Under the circumstances of this case, we do not think the court would have been justified in refusing to confirm the report, and setting aside the sale. The motion must be decided on the ground of inadequacy of price alone. We have held the deeds of trust were valid. As we have shown, there had been two public sales of the property, not far apart, and at each sale it brought two thousand dollars. True, the mere opinion of witnesses say it was worth three thousand dollars, and then say they thought in the near future it would bring two thousand five hundred dollars or three thousand dollars. The public sales test its value, when fairly made, better than the mere opinions of witnesses. One person thought it sold at its full value. It would have been error to set aside the sale

under the circumstances, or at least the court did not err in refusing to set it aside. There is nothing in the offer of Clark to show it sold at an inadequate price, as even the two thousand five hundred dollars would not pay his liens against it. The acceptance of Clark's advance bid, under the circumstances, was not, therefore, an error to the prejudice of the appellant. As we have seen, it would not have been error in the court to have refused to set aside the sale without any such offer.

It is also assigned as error that the court, in its decree, required the debtor to give a bond of \$200 before the sale could be set aside. The decree provided: "But if the plaintiff, or some one for him, shall, within twenty days from this date, give to the special commissioner a bond, with good security, in the penalty of \$200, with condition that, on a resale of said property, it shall sell for \$2,750, or the parties to the bond will pay \$200, then the said commissioner shall resell the said property on the same terms, and after the same advertisement as before; otherwise, the said sale shall stand confirmed to the purchaser at the price of \$2,500." Of course, this was all irregular; no advanced bid had been made by the debtor, and a bond could not be properly executed payable to the commissioner. The manner in which a sale can be set aside on an advance bid is shown in *Stewart v. Stewart*, 27 W. Va. 177. This provision should not have been inserted, and the decree must be corrected by striking out said provision; and as the error was not to the prejudice of the appellant, when it is thus corrected, both decrees appealed from are affirmed, with costs.

HOMESTEAD—RIGHT TO ALIENATE OR ENCUMBER: *Sampson v. Williamson*, 6 Tex. 102; 55 Am. Dec. 762, and note 771; *Austin v. Underwood*, 37 Ill. 438; 87 Am. Dec. 254, and note 257; *Dickson v. Chorn*, 6 Iowa, 19; 71 Am. Dec. 382, and note 387; *Stewart v. Mackey*, 16 Tex. 56; 67 Am. Dec. 609, and note 612; note to *Magee v. Magee*, 99 Id. 574.

HOMESTEAD, MANNER AND MODE OF ENCUMBERING.—A mortgage lien on a homestead cannot be created without the written consent of the wife; the husband alone, by his contract, cannot change the character or the priority of a mortgage lien on a homestead; neither can he alone restore it after loss, or re-create it, without the consent of the wife, in the exact manner prescribed by law: *Jenkins v. Simmons*, 37 Kan. 496. When the wife does not join the husband in making the deed, the status of the land as a homestead remains unaltered: *Simpson v. Houston*, 97 N. C. 344. If a loan of money is secured by a deed to the homestead of the debtor absolute on its face, contemporaneous with which is executed an agreement in writing to reconvey on the repayment of the money loaned, such deed is invalid, either as a conditional transfer or mortgage, when not signed and executed by the wife as

required by the statute: *Moore's Ex'r v. Wills*, 69 Tex. 109. A contract to convey a homestead, entered into by a wife in her own name, will not be specifically enforced, as the statute requires the conveyance to be signed and acknowledged by both husband and wife: *Larson v. Butts*, 22 Neb. 370.

WAIVER OF BENEFIT OF EXEMPTION LAW in note or executory contract is invalid: *Curtis v. O'Brien*, 20 Iowa, 376; 89 Am. Dec. 543, and note 545; note to *Bowman v. Smiley*, 72 Id. 741-745; *Carter v. Carter*, 20 Fla. 588; 51 Am. Rep. 618.

HOMESTEAD, WAIVER OF. — A debtor's mortgage of his homestead for a particular debt operates as a waiver of his homestead right in the lands conveyed as to that debt only, but not as to his other debts: *Hall v. Fulgham*, 86 Tenn. 451. Express waiver of homestead in a deed or mortgage is unnecessary, and adds nothing to the scope or legal effect of the instrument: *Id.* While the homestead right may be waived by a conveyance by husband and wife purporting to convey the whole estate, and which contains no limitation, either in the deed itself or in the certificate of the wife's acknowledgment, yet if it appears, either in the deed or in the wife's acknowledgment, that she only released her dower, it will not operate as a waiver of the homestead: *Hayden v. Robinson & Co.*, 83 Ky. 615. A waiver of the right of homestead and exemption, made as a part of a usurious contract, is void; and although a note bearing a usurious interest contained a full and general waiver of the right of homestead and exemption, and was subsequently reduced to judgment, the execution issued thereon cannot be collected out of property exempted as a homestead: *Cleghorn v. Greeson*, 77 Ga. 343. The release or waiver of the homestead exemption, to be valid as against a mechanic's lien, for additional improvements, must be in writing, "subscribed by the defendant and his wife, and acknowledged and recorded in the same manner as conveyances of real estate"; otherwise the mechanic's lien is subordinate to the right of homestead. The mechanic's lien has the preference, however, where the lot was vacant when the mechanic entered upon it to make the improvement, and the improvement created the homestead: *Roberts v. Riggs*, 84 Ky. 251.

ERRONEOUS RULING NOT PREJUDICIAL to appellant will not work a reversal of the judgment: *Higgins v. Carlton*, 28 Md. 115; 92 Am. Dec. 666; *Matter of Smith*, 4 Nev. 254; 97 Am. Dec. 531, and note 540; *Matthews v. Phelps*, 61 Mich. 327; 1 Am. St. Rep. 581.

SWEENEY v. GRAPE SUGAR COMPANY.

[30 WEST VIRGINIA, 443.]

CORPORATIONS. — DIRECTORS OF CORPORATION ARE TRUSTEES for the corporation, and within the rule that one holding a fiduciary relation to trust property cannot, either directly or indirectly, become the purchaser of such property, or transfer it to his own use, or for his own benefit, and if he does, the sale or transfer is voidable, and will be set aside at the mere pleasure of the beneficiaries, though such fiduciary may have paid full price and gained no advantage.

FRAUDULENT CONVEYANCE — INSOLVENT CORPORATION. — Conveyance authorized by the directors of an insolvent corporation of all of its property to secure a debt due from it to another corporation, at a meeting of direc-

tors in which several of the persons participating and voting for the conveyance are directors of the corporation for whose benefit the conveyance is executed, is *prima facie* fraudulent and void, as to the grantor and its stockholders and creditors. The burden is upon the grantor to remove the presumption of fraud by convincing proof of the fairness of the transaction, and its absolute freedom from fraud.

FRAUDULENT CONVEYANCE. — INSOLVENT CORPORATION. — Creditors of an insolvent corporation have the right to avoid a transfer of the corporate property made by its directors in violation of their trust and duties, or for the benefit of themselves, either directly or indirectly, where the rights of no innocent third party have intervened, and there has been no unreasonable delay on the part of such creditors.

FRAUDULENT CONVEYANCE — INSOLVENT CORPORATION — LIEN OF CREDITORS. — Assets of an insolvent corporation are not a trust fund, and creditors may secure preferences therein by obtaining liens by judgment, or otherwise.

W. P. Hubbard and H. M. Russel, for the appellants.

Caldwell and Caldwell, and Daniel Lamb, for the appellee.

SNYDER, J. The Wheeling Grape Sugar and Refining Company was, in July, 1881, created and organized as a corporation, under the provisions of chapter 54 of the code of the state, for the purpose of manufacturing glucose, or grape sugar. At the first meeting, the stockholders elected C. E. Dwight, W. Leighton, F. P. Jepson, A. M. Adams, and Victor Rosenberg directors of the company. The directors elected C. E. Dwight president, and F. P. Jepson secretary and treasurer. Afterwards the board of directors elected A. C. Egerter secretary. In January, 1882, the same persons were re-elected directors, and the board elected the following officers: C. E. Dwight president, F. P. Jepson treasurer, and A. C. Egerter secretary; and these same persons acted and continued to be the directors and officers of the company until January, 1883. At the time the directors were first elected, the said Adams and Rosenberg were stockholders and directors of the Ohio Valley Bank, and said Jepson was the cashier of said bank; and they each continued to be such officers of the bank during the whole time they were directors of the Grape Sugar company. The principal offices and places of business of both said company and bank were in the city of Wheeling, in this state. The business of said company seems to have been experimental, and proved to be unsuccessful, if not a complete failure. Prior to September 2, 1882, the company had become largely indebted to said Ohio Valley Bank and others, and at that time, its embarrassments and financial condition were

such that it was known to the directors that unless additional capital stock could be sold, or a large amount of money raised upon bonds to be issued, the business of the company could not be continued, and that it would have to cease its operations for the want of funds and credit, and that it would be sued and closed up by the creditors. The company was, in fact, then wholly insolvent, and unable to meet its obligations or pay its existing indebtedness. In these circumstances, the board of directors held a meeting, August 31, 1882, at which there were present Dwight, Leighton, Rosenberg, and Jepson, as directors, and passed a resolution authorizing Dwight, the president of the company, "to execute a deed of trust on all the real estate, buildings, and machinery owned by the company, to secure the payment of twenty thousand dollars borrowed of the Bank of the Ohio Valley; and also to execute such deed of assignment of all personal property of said company, including corn, blackstrap, all manufactured syrup on hand, all barrels, and all book-accounts due the company, as will properly secure the Bank of the Ohio Valley upon overdraft due from the company to said bank." The said Rosenberg and Jepson were present, acting as directors, when said resolution was passed, and they, as well as the two other directors then present, voted for it. Afterwards, on September 2, 1882, C. E. Dwight, as president, on behalf of said company, executed two trust deeds, known in the record as exhibits 22 and 23. The first, exhibit 22, conveys to W. A. Isett, trustee, a number of lots of land, which are fully described, situate in the city of Wheeling, and designated as the property of the company; "and also all the buildings, real estate, and machinery belonging to the grantor in Ohio County, West Virginia," in trust to secure to the Bank of the Ohio Valley, a corporation existing under the laws of the state of West Virginia, the payment of four promissory notes of five thousand dollars each, and any renewals thereof, with the interest thereon. The notes are copied into the deed. The first is dated May 3, 1882, the second May 11, 1882, the third July 26, 1882, and the fourth August 29, 1882, aggregating twenty thousand dollars, all payable to the order of the company at the said bank four months after their respective dates. The second deed, exhibit 23, conveys to the same trustee "all the corn, blackstrap, manufactured syrup, barrels, book-accounts, evidences of debt, and all the personal property of every kind whatsoever, wheresoever situated, now belonging to the said

company; and also all the corn, blackstrap, manufactured syrup, barrels, book-accounts, evidences of debt, and all the personal property of every kind and description, wherever situated, of which the said company may hereafter become possessed, or to which it may hereafter become entitled, in trust to secure to the Bank of the Ohio Valley the payment of \$14,909.14, money now [then] due said bank, and the interest thereon till paid, and also to secure to said bank the payment of any sums of money that it may in future permit to become due to it from said company in the way of drafts or overdrafts, or in any other manner."

After empowering the trustee to sell the property thus conveyed upon being directed so to do by the bank, the deed provides that the trustees shall collect the evidences of debt and book-accounts "upon being directed to do so by said bank," and apply the proceeds of such sales and collections to the payment of expenses and the debt secured. Both of these deeds were acknowledged on September 4, 1882, before a notary of Ohio County, and the first was recorded in said county on December 6, 1882, and the second on December 11, 1882. The board of directors held another meeting September 11, 1882, at which four directors were present, to wit, Dwight, Adams, Rosenberg, and Jepson, and passed the following resolution: "Resolved, that the president of the Wheeling Grape Sugar and Refining Company be, and he is hereby, ordered to execute an additional deed of trust on the real estate, buildings, machinery, and fixtures of the company, to secure the Bank of the Ohio Valley for overdraft due said bank from said company this day, and also to secure any future overdrafts." All said directors acted in said meeting, and voted for said resolution. By deed dated on said eleventh day of September, 1882, known in the record as exhibit 24, said company, by C. E. Dwight, its president, conveyed to W. A. Issett, the same person named as trustee in the two deeds before mentioned, all the real estate, buildings, and machinery of the company described in the aforesaid deed, exhibit 22; "in trust to secure to the Bank of the Ohio Valley \$14,602.08, money now [then] due said bank and its interest; and also any money that the bank may in future permit to become due to it from said company, in the way of drafts, overdrafts, or in any other manner." This deed, and also the other two deeds, provide that the trustee may act by agent or attorney in the execution of his trust. This deed was acknowledged in Ohio

County on September 12, 1882, and was recorded in said county on December 6, 1882.

Thompson and Hibberd, as partners, on September 2, 1882, the day the first two deeds aforesaid were executed, caused to be filed in the clerk's office of said county a mechanic's lien upon the property of said Grape Sugar company for labor done and materials furnished to it upon contract prior to that date, amounting to \$4,999.84; and subsequently other mechanics and laborers filed similar liens for materials and labor furnished said company, and other creditors brought suits and recovered judgments against said company,—some of whom recovered judgments before and others after said deeds had been recorded. Several of these creditors sued out attachments and had them levied on the property of the company conveyed by the deeds, after the deeds had been recorded, and a number of them, after they recovered judgments, had executions issued thereon and levied upon the personal property of the company conveyed in said deed, exhibit 23. On January 18, 1883, A. J. Sweeney and Son, the Exchange Bank of Wheeling, and other creditors who had thus recovered judgments, issued attachments and sued out executions against the said Grape Sugar company, filed their bill in the circuit court of Ohio County, against the said company, the Bank of the Ohio Valley, W. A. Isett, trustee, and others, to have the aforesaid deeds (exhibits 22, 23, and 24) set aside and annulled, upon the grounds that each of them had been executed without legal authority, that they were fraudulent *per se* as well as fraudulent in fact, and therefore inoperative and void as to their debts against the company. On the day said bill was filed, the court, on the motion of the plaintiffs, awarded an injunction inhibiting the defendants, the said company, the Bank of the Ohio Valley, and W. A. Isett, trustee, from selling or in any manner disposing of the property, real or personal, mentioned in said deeds, or from collecting any of the debts due said company; and upon like motion the court afterwards appointed a receiver to take charge of all the property and assets of the said company. In February, 1883, Thompson and Hibberd filed their bill in said court against the said Grape Sugar company and others to enforce their aforesaid mechanic's lien against the real estate of said company, and by their answer filed to the bill of Sweeney and Son and others, the said Thompson and Hibberd unite in the allegations and prayer of said bill as to the invalidity and fraudu-

lent character of the trust deeds to W. A. Isett, and ask that said deeds may be set aside.

By consent of all the parties, these two causes were consolidated, and by like consent, the court, on February 22, 1883 entered a decree directing commissioners appointed by it to sell all the real estate of the defendant, the Grape Sugar company, and also all the fixtures and personal property of said company, except the portion thereof which had been ordered to be sold by the receiver. But this decree is without prejudice to any of the parties, and they are to have the same priorities and rights to prosecute their demands and defend their interests as if this decree had not been entered. The whole amount realized from the sale of all the real estate of the Grape Sugar company was \$22,050, and the amount realized from the sales of all the personal property and the collections of debts due to said company was \$4,325.95, making the whole assets of the company \$26,375.95. The Bank of the Ohio Valley filed its answer, denying the invalidity of any of said three trust deeds, and claiming that they were *bona fide*, and a valid security for the indebtedness of the company to it, which indebtedness was reduced to judgment on April 9, 1883, and then amounted to \$31,474.43.

The cause was referred to a commissioner, who filed his report showing the amounts and priorities of the respective claims against the real and personal property and assets of the Grape Sugar company. He reported that the plaintiffs, Thompson and Hibberd, were entitled to the security of their mechanic's lien to the extent of \$3,779.10, being only part of their claim. The commissioner found that the trust deed, exhibit 23, "shows on its face that it was the intention of the company, when it was executed, to retain the possession and control of the property therein conveyed, to use and consume portions of it, to sell portions, to collect the book-accounts and evidences of debt, and to contract and pay debts. And that such was the intention of the company, is further evidenced by the fact that it did, after the execution of the deed, and up to the time the receiver appointed herein took charge thereof, retain the possession and control of the property, using and consuming portions, and selling other portions, collecting the book-accounts and evidences of debt, and contracting and paying debts." The commissioner finds these facts in support of the conclusion that the provision in the deed, which conveys, not only all the property the company

owned at the time, but also all "the evidences of debt, and all the personal property, of every kind and description, wherever situated, of which the company may hereafter become possessed, or to which it may hereafter become entitled," renders the deed fraudulent on its face; citing *Livesay v. Beard*, 22 W. Va. 592; *Klee v. Reitzenberger*, 23 Id. 749; and *Shattuck v. Knight*, 25 Id. 590. "Your commissioner, therefore, by reason of the matters hereinbefore set forth, reports that the deed of trust, exhibit 23, aforesaid, is fraudulent on its face, and void as against the complainants and the other creditors of said company, and that the trust deeds, exhibits 22 and 24, being parts of the same transaction, are also fraudulent and void as against the complainants and other creditors of said company."

The further conclusion of the commissioner as reported was, that the two latter deeds were not fraudulent by reason of the fact that they were withheld from record for over three months after their execution, nor for the reason that the officers of the Bank of the Ohio Valley participated in the meetings of the board of directors of the Grape Sugar company, and voted for the resolutions authorizing the making of said deeds. The plaintiffs and the defendant, the Bank of the Ohio Valley, filed exceptions to the commissioner's report, — the plaintiffs, A. J. Sweeney and Son, *inter alia*, because the commissioner found that the statute forbidding a member of the board of directors from voting upon, or being present at the time the board acts upon, any question in which he is interested, was enacted solely for the protection of the stockholders of the corporation, and that consequently they alone can impeach the validity of acts done in violation thereof; and also because the commissioner found that the resolutions authorizing the trust deeds were free from actual fraud. The plaintiffs, Thompson and Hibberd, in addition to the grounds just stated, excepted because the commissioner refused to report the whole of their claim as covered by their mechanic's lien. The defendant, the Bank of the Ohio Valley, excepted because, — 1. The commissioner allowed certain specified items of the claims of Thompson and Hibberd as embraced in their mechanic's lien, which he should have excluded; 2. That he improperly reported the trust deed, exhibit 23, fraudulent on its face; and 3. That he erroneously found the deeds, exhibit 22 and 24, parts of the same transaction, and therefore invalid as to the plaintiffs and other creditors. The court by its de-

crees sustained a portion of the exceptions of the Bank of the Ohio Valley to the claim of the plaintiffs, Thompson and Hibberd, and reduced the amount which they were entitled to have included in their mechanic's lien to \$3,535.89; it also sustained the exception of the bank to the finding of the commissioner that the deeds, exhibits 22 and 24, were invalid, and held that each of said deeds were valid, and that the bank was entitled to the benefit of the lien on the real estate of the company thereby created. It overruled the exceptions of the plaintiffs, Sweeney and Son, and in all respects, except as aforesaid, it sustained and confirmed the report of the commissioner. The report having been modified according to said decree, the court on January 26, 1886, entered a final decree ordering the distribution of the whole fund in accordance with the principles thus settled. The plaintiffs in both these suits appealed from said decree to this court.

The important question to be determined, and the one to which nearly the whole of the discussion in the elaborate briefs filed in this court are confined, is whether or not the three trust deeds executed to secure the Bank of the Ohio Valley, or any of them, are sufficient and valid conveyances. It is shown by the record, as hereinbefore stated, that the same person, W. A. Isett, is the trustee in each of said deeds, and that he was at the time, and continued to be, the president of said bank; that at the meeting of the board of directors of the Grape Sugar company which passed the resolution authorizing the first two of said deeds, there were present but four directors, one of whom was Jepson, the cashier of said bank, and another Rosenberg, a director of said bank, and that both of these acted and voted for said resolution, and that at the meeting at which the resolution was adopted authorizing the third deed, of the four directors present, two were directors and the third the cashier of said bank, and both of said directors and said cashier acted and voted for said resolution. The Grape Sugar company was insolvent at this time, and that fact was, or ought to have been, apparent to the directors. It was wholly unable to meet or pay its debts. It is a well-settled principle of equity jurisprudence that a party holding a fiduciary relation to trust property cannot, either directly or indirectly, become the purchaser of such property, or transfer it to his own use or for his benefit; and if he does, the sale or transfer is voidable, and will be set aside at the mere pleasure of the beneficiaries, although such fiduciary may have paid a

full price and gained no advantage: *Newcomb v. Brooks*, 16 W. Va. 32, 59, and cases cited. In *Reilly v. Oglebay*, 25 Id. 36, 43, this court, following *Newcomb v. Brooks*, *supra*, says: "This rule is not confined to trustees and fiduciaries in the technical sense of those terms, but it extends to every person coming within the reason of the rule. It embraces trustees, guardians, executors, administrators, agents, cashiers of banks, factors, auctioneers, sheriffs, commissioners in bankruptcy, and their solicitors, assignees of bankrupts, attorneys at law, directors of corporations, and parties bearing many other relations to each other which may not be classified": *Newcomb v. Brooks*, 16 W. Va. 63; *Abbot v. American etc. Co.*, 33 Barb. 578.

This rule does not seem to be questioned by the counsel for the Bank of the Ohio Valley in this cause; neither do they seem to deny that the rule applies to the deeds under consideration. But they insist that, conceding the acts of the directors of the Grape Sugar company, in effecting the conveyance of the property of that company for the benefit of the bank, of which a part of said directors were also officers and part owners, was a breach of duty by the directors of said company, and thereby rendered the conveyances voidable, still such breach of duty makes the conveyances voidable only at the election of the corporation itself, or its stockholders, and that it cannot, for that cause, be avoided at the election of the creditors of the corporation. In support of this position, they rely upon the following, among other cases: *Gordon v. Preston*, 1 Watts, 385; 26 Am. Dec. 75; *Beecher v. Rolling Mill Co.*, 45 Mich. 103; *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. L. 505; *Wallace v. Long Island R. R. Co.*, 12 Hun, 460; *U. S. Rolling Stock Co. v. Atlantic etc. R. R. Co.*, 34 Ohio St. 450; 32 Am. Rep. 380; 2 Morawetz on Corporations, secs. 630, 631; *Pierce on Railroads*, 39; 3 Pomeroy's Eq. Jur., sec. 1094; *Detroit v. Dean*, 106 U. S. 537; *Dimpfell v. Railway Co.*, 110 Id. 209. These cases are all founded upon facts wholly different from those in the case at bar. Some of them are cases in which subsequent purchasers of the equity of redemption of the corporate property sought to avoid the mortgage which existed on the property at the time they purchased. This, of course, they had no right to do. They took the property *cum onere*, and with full notice. Others are cases in which there had been unreasonable delay in the election to avoid the transaction. In some of them, the rights of innocent third persons

had intervened. In others, the corporations were solvent, and of course, in such case, the act could injure only the corporation and its stockholders, and they alone could have any title to avoid the act. The most of them, however, are cases in which the stockholders and others attempted to sue without showing that the corporation had refused to sue, according to the general rule in such cases: 3 Pomeroy's Eq. Jur., sec. 1095. In none of them have I been able to find any principle which would deny to the creditors of an insolvent corporation the right to avoid the transfer of the corporate property, made by its directors in violation of their trust and duties, or for the benefit of themselves, either directly or indirectly, in a case in which the rights of no innocent third persons had intervened, and there had been no unreasonable delay on the part of the creditors in seeking to avoid the transfer. In *Thomas v. Brownville etc. R. R. Co.*, 109 U. S. 522, 524, the court says: "Such contracts are not void, but voidable at the election of the parties affected by the fraud. It may often occur that, notwithstanding the vice of the transaction, namely, the directors or trustees, or a majority of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is, therefore, at the option of these latter to avoid it, and until some act of theirs indicates such purpose, it is not a nullity." This evidently refers to solvent corporations; at the most, it cannot refer to a corporation which is both insolvent and so embarrassed that it has neither funds nor credit to continue its corporate business. Even if this is not so, the language of the court is, that the contracts are "voidable at the election of the parties affected by the fraud." In the case of a corporation which is wholly insolvent, and unable to continue its business, neither the corporation itself nor its stockholders have any beneficial interest in its property, and therefore they cannot be affected by the fraud. In such case, the creditors alone can be affected, and they alone have any interest in avoiding the contracts: *Lamb v. Pannell*, 28 W. Va. 663, 666; 2 Morawetz on Corporations, secs. 787, 788.

Our statute declares that "no member of the board [of directors] shall vote on a question in which he is interested otherwise than as a stockholder (except the election of a president), or be present at the board while the same is being con-

sidered": Code, sec. 52, c. 53. In *Hope v. Salt Co.*, 25 W. Va. 807, Woods, J., after quoting this statute in the opinion of the court, says: "This would seem to leave every such act of the directors open to explanation; but we are of opinion that even then, unless it was made to appear by clear and convincing testimony that such act was free from all taint of fraud or unfairness on the part of the director, it ought to be set aside at the option of the beneficiary, or of the party standing in such position. Such advantage, so obtained by such director, ought to be held *prima facie* fraudulent, yet capable of being purged of the fraudulent taint by clear and convincing proof of its fairness, reasonableness, and absolute freedom from fraud and unfairness." On the same page it is said: "But it may be safely assumed that in any case where one director participated with others in any act in regard to the trust property for the benefit of the fiduciary at the expense of the *cestui que trust*, such act was for that cause fraudulent as to him." This was a suit brought by creditors to set aside a conveyance made by the directors of the corporation to one of its directors. It did not in that case appear that the grantor in the deed acted at the meeting which authorized the conveyance, but the same was nevertheless set aside at the suit of creditors of the corporation. The doctrine announced in that case is certainly correct, and fully sustained by the authorities, when the corporation is wholly insolvent and the conveyance is of the entire property and effects of the corporation. In such case, if the conveyance is in whole or in part for the benefit of one or more of the directors who acted in the board and voted for the resolution authorizing the conveyance, the same will, in a court of equity, be regarded as at least *prima facie* fraudulent, not only as to the corporation and its stockholders, but its creditors: *James v. Railroad Co.*, 6 Wall. 752; *Drury v. Cross*, 7 Id. 299; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Butts v. Wood*, 37 N. Y. 317. This conclusion in no manner affects the principle decided in the cases of *Burr's Ex'r v. McDonald*, 3 Gratt. 215, and *Pyles v. Furniture Co.*, 30 W. Va. 129. The conveyance in the first of these cases was made by the stockholders in general meeting. The latter case was simply a suit to set aside a conveyance of all its property by an insolvent corporation on the ground that such insolvent corporation could not legally make preference among its creditors. There was no attempt in either case to show that any of the stockholders or directors who authorized

the conveyances were in any way interested as *cestuis que trust* or otherwise in the conveyances.

In the case at bar, two of the directors at the one meeting, and three at the other, which ordered the execution of the trust deeds in question, who were present and voted for the order directing the conveyances, were either directors or cashier of the bank for whose use the conveyances were made, and therefore interested in the capacities both as fiduciary and *cestuis que trust*. They acted in antagonistic positions, with the preponderance of their interests greatly in favor of the bank, and against that of the company for which they assumed to act; consequently, according to the principles above announced, the conveyances were *prima facie* fraudulent and void as to the plaintiffs and other creditors in these causes. The burden was upon the bank to remove this presumption of fraud by "convincing proof of the fairness of the transactions, and their absolute freedom from fraud and unfairness." The evidence and circumstances in the record wholly fail to furnish such proof; but, on the contrary, the proofs and circumstances tend to show that the acts of the directors and cashier of the bank in causing said conveyances to be made were such as to give to the bank an unfair preference among the creditors of the Grape Sugar company. There is nothing in the record to prove that the debt due to the bank was of any higher dignity or imposed any greater obligation upon the company for its payment than the debts due to the plaintiffs here, and other creditors; nor does it appear that if the directors and cashier of the bank had not participated in passing the resolutions giving such preference to the bank, that such advantage would have been given to debts due to it. My conclusion therefore is, that all and each of said three trust deeds (exhibits 22, 23, and 24) are invalid as to the debts of the plaintiffs and other creditors, for the reasons hereinbefore stated. This conclusion makes it unnecessary to pass upon the questions whether, for the reasons stated in the report of the commissioner, these deeds or any of them are fraudulent on their face or in fact. I think, however, that the finding of the commissioner as to the deed, exhibit 23, is correct, and sustained by the authorities cited by him.

It is suggested by counsel for the Bank of the Ohio Valley that the effect of holding said trust deeds inoperative should be followed by a direction that the assets of the Grape Sugar

company must be ratably distributed among all the creditors of the company, upon the ground that the assets of an insolvent corporation are a trust fund, and that therefore no preference can be given by the corporation itself among its creditors, or be secured by obtaining liens by judgments, or otherwise. This position was directly repudiated by this court in *Pyles v. Furniture Co.*, 30 W. Va. 123, and therefore needs no further notice.

It is insisted by the counsel for said bank that the actions of both the court and the commissioner, in respect to the mechanic's lien of the plaintiffs Thompson and Hibberd, were too liberal to that firm, and allowed them an amount by virtue of said lien in excess of what was actually covered by it. The conclusion already announced, by which the trust deeds to secure the bank are set aside, renders it immaterial to the interests of the bank whether said lien is effective or not, because the said Thompson and Hibberd, by filing their bill, and by assailing said deeds in their answer to the bill of A. J. Sweeney and Sons, acquired a lien on the property of the Grape Sugar company for their whole debt, regardless of their mechanic's lien, before the bank obtained any judgment or other lien for its debt, and they are therefore entitled to a preference in the payment of their debt over that of the bank: Code, sec. 2, c. 133; *Wallace v. Treacle*, 27 Gratt. 487; *Hughes v. Hamilton*, 19 W. Va. 393.

Having considered and decided all the material questions presented by the record, I am of opinion, for the reasons herein stated, that the decrees of December 7, 1885, and February 27, 1886, of the circuit court, be reversed, and this cause remanded to that court for further proceedings, in accordance with the principles announced in this opinion.

OFFICERS OF INSOLVENT CORPORATION are trustees for its creditors.
Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110; 58 Am. Dec. 449.

CARROLL v. EXCHANGE BANK.

[30 WEST VIRGINIA, 518.]

BANKS AND BANKING — ACCOUNTS BETWEEN BANKS, LIEN FOR BALANCE DUE ON. — Where there have been for several years mutual and extensive dealings between two banks, and an account-current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection when received, and charged all costs, and accounts were regularly transmitted from one to the other, and settled upon these principles, and upon the face of the paper transmitted it always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account, there is a lien for a general balance upon the paper thus transmitted, no matter who may be its real owner.

BANKS AND BANKING — BANKER'S LIEN. — If a receiving and collecting bank, at the time of mutual dealings with the bank sending paper, has notice that such bank has no interest in the paper transmitted, and that it transmits such paper merely as agent, then the collecting bank is not entitled to retain against the bank transmitting the paper for the general balance of the account with such bank.

BANKS AND BANKING — BANKER'S LIEN. — If a collecting bank has no notice that the bank sending the remittance was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the collecting bank is not entitled, as against the real owner, to a lien for general balance of account, unless credit was given to the bank sending the paper, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of dealings between the two banks.

BANKS AND BANKING — BANKER'S LIEN. — If, in mutual dealings between banks, the collecting bank regarded and treated the bank transmitting negotiable paper as the owner of such paper transmitted for collection, and had no notice to the contrary, and upon the credit of such transmittance, made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the bank making the remittance, to be met by the proceeds of such negotiable paper, then the collecting bank is entitled to a lien against the real owner of such paper, for the balance of account due from the bank transmitting such paper.

A. J. Clarke, for the plaintiff in error.

H. M. Russell, for the defendant in error.

JOHNSON, President. On the twenty-sixth day of May, 1884, the Penn Bank of Pittsburgh, Pennsylvania, failed, and closed its doors at twelve o'clock and five minutes, P. M. There had been between it and the defendant, the Exchange Bank, mutual dealings and accounts. These dealings had been mutual and reciprocal, large amounts being sent for collection from one to the other. The balance was generally in favor of the Penn Bank. Remittances had been asked from

time to time, and were generally in even thousands. The balances were usually allowed to accumulate until they reached a certain figure,—no fixed figure, but it would run up to a few thousands,—when one or the other would call for a remittance.

There was a considerable balance due the Penn Bank on the 24th of May, 1884. On that day the Penn Bank called by telephone to the Exchange Bank, and asked for a remittance, and the latter bank responded by sending draft on New York for two thousand five hundred dollars, and asked the National Exchange Bank of Steubenville, which owed the defendant several thousand dollars, to remit said sum to the Penn Bank for account of the defendant. On that day the Exchange Bank remitted to the Penn Bank about five hundred dollars more than it owed that bank, exclusive of collections due from it to the defendant. On the said twenty-fourth day of May, 1884, in regular course of business, the following draft was sent from the Penn Bank to the defendant, the Exchange Bank:—

“\$1,500.

PITTSBURGH, May 24, 1884.

“At sight, pay to the order of Penn Bank fifteen hundred dollars, value received, and charge to account of

“D. W. C. CARROLL.

“To RIVERSIDE IRON WORKS, Wheeling, W. Va.”

The draft was indorsed:—

“Pay Exchange Bank or order, for account Penn Bank, Pittsburgh, Pa.

“G. L. REIBER, Cashier.”

The draft was inclosed in a letter, bearing the names of the officers of the Penn Bank, etc., which is as follows:—

“PITTSBURGH, May 24, 1884.

“EXCHANGE BANK, Wheeling, W. Va.

“*Dear Sir,*—We inclose for collection 9,560, Wheeling Pottery Co., no prin., 23.07; 9,561, Riverside Iron Works, no prin., 1,500.

“Yours respectfully,

“G. L. REIBER, Cashier.”

The cashier of the Exchange Bank, in his evidence, says that the draft was received on the morning of the 26th (which was Monday), and entered at once to the credit of the Penn Bank, and sent by messenger to present it to the drawee, who paid it about half-past 9 o'clock that morning. In the afternoon, the Exchange Bank was informed of the failure of the Penn Bank. Some time after, a statement was sent from the

officers of the Penn Bank, which showed that when the failure occurred, after giving the Exchange Bank credit for the \$1,500 sight draft, the balance due the said Exchange Bank was \$205.43. The first notice the Exchange Bank received, other than what appears upon the face of the draft and letter, if any there appears, that Carroll had any interest in the draft, was by the following telegram, received by the defendant the next day, May 27th. It was dated on the same day:—

“Mail D. W. C. Carroll, Pittsburgh, proceeds of draft on Riverside Iron Works to-day.

“ISAAC W. VAN VOORHES,
“Solicitor Penn Bank.”

This the Exchange Bank refused to do. It appears that these mutual dealings between the two banks continued for about four years. It is shown in the bill of exceptions that D. W. C. Carroll was in fact the owner of the draft, and that he had sent it through the Penn Bank for collection; although of this fact the officers of the Exchange Bank were ignorant, unless they were notified of the fact by the draft, indorsement, and letter transmitting it. On the twenty-fifth day of June, 1886, in the circuit court of Ohio County, the said D. W. C. Carroll brought an action of *assumpsit* to recover of the Exchange Bank the amount of said draft and interest, and in the record the above-stated facts appear. On the eleventh day of January, 1887, the case having been submitted to the court in lieu of a jury, the court rendered judgment in favor of the plaintiff, against the defendant, for \$1,735.25, with interest from that date, and costs. To this judgment the defendant obtained a writ of error.

On the facts, Did the court err in rendering judgment for the plaintiff?

In *Bank of Metropolis v. New England Bank*, 1 How. 234, the supreme court of the United States held that when there have been for several years mutual and extensive dealings between two banks, and an account current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection, when received, and charged all costs of protest, postage, etc.,—accounts regularly transmitted from the one to the other, and settled upon these principles, and upon the face of the paper transmitted it always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account,—there is a lien for a general balance of account upon the paper

thus transmitted, no matter who may be its real owner. Taney, C. J., in delivering the opinion of the court in this case, said: "If the notes remitted had been the property of the Commonwealth Bank [that is, the transmitting bank], there would be no doubt of the right to retain; because it has long been settled that whenever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balances, unless such securities were delivered to him under a particular agreement. The paper in question was, however, the property of the New England Bank, and was indorsed and delivered to the Commonwealth Bank for collection, without any consideration, and as its agent, in the ordinary course of business; it being usual, and, indeed, necessary, so to indorse it, in order to enable the agent to receive the money. Yet the possession of the paper was *prima facie* evidence that it was the property of the last-mentioned bank; and without notice to the contrary, the plaintiff in error had a right so to treat it, and was under no obligation to inquire whether it was held as agent or as owner; and if an advance of money had been made on this paper to the Commonwealth Bank, the right to retain for that amount would hardly be disputed. We do not perceive any difference in principle between an advance of money, and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited, or expected to be transmitted, in the usual course of the transactions between the parties. There does not, indeed, appear to have been any express agreement that these balances should not be immediately drawn for, but it may be implied from the manner in which the business was conducted; and if the accounts show that it was their practice and understanding to allow them to stand, and await the collection of the paper remitted, the rights of the parties are the same as if there had been a positive and express agreement; and such mutual indulgence on these balances would be a valid consideration, and, like the actual advance of money, give the plaintiff in error a right to retain the amount due on closing the account. It is evident a loss must be sustained, either by the plaintiff or defendant in error, by the failure of the Commonwealth Bank. We see no ground for maintaining that there is any superior equity on the side of the New England Bank. It contributed to give to the corporation which has proved insolvent credit with the

plaintiff in error by the notes and bills which it placed in its hands to be sent to Washington for collection, indorsed in such a form as to make them *prima facie* the property of the Commonwealth Bank, and enabled it to deal with them as if it were the real owner. The Bank of the Metropolis, on the contrary, is in no degree responsible for the confidence which the defendant in error reposed in its agent; and when this misplaced confidence has occasioned the loss in question, it would be unjust to throw it upon the bank, which has been guilty of no fault or want of caution, and which was induced to give the credit by the manner in which the defendant in error placed its property in the hands of an agent unworthy of the trust." The judgment of the court below was reversed, and the case remanded for a new trial. Judgment was again had in favor of the New England Bank, and the case was again brought up on writ of error (6 How. 212); and the court held that the following instructions to the jury would have carried out the opinion of the supreme court: "If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills or notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to retain, against the New England Bank, for the general balance of the account with the Commonwealth Bank." 2. "And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled, against the real owner, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks." 3. "But if the jury find that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable note which it transmitted for collection, and had no notice to the contrary, and upon the credit of such remittances, made or anticipated in the usual course of dealings between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the Bank of the Metropolis is entitled to retain against the New England Bank

for the balance of account due from the Commonwealth Bank." Among other things, as the bill of exceptions shows, the plaintiff asked the court to instruct the jury "that the said last-mentioned notes were transmitted to the said Bank of the Metropolis in letters notifying the defendants that they were transmitted for collection in the form commonly used by said banks in transmitting negotiable paper for collection, and with no other instruction as to who was the real owner of such negotiable paper, then it is competent for the jury to infer from the facts aforesaid that the defendant had notice that the said paper was transmitted by the Commonwealth Bank as agent, and not as the owner thereof; and if the jury shall so find, then the plaintiff is entitled to recover, notwithstanding the jury shall find that the said Commonwealth Bank and the Bank of the Metropolis treated each other as the true owners of the paper so remitted, and notwithstanding they further find that balances were from time to time suffered to remain in the hands of each other, to be met by the proceeds of negotiable paper deposited, or expected to be transmitted, in the usual course of dealing between them, and notwithstanding the course of dealing stated in the instruction heretofore given at the instance of the defendants." To this instruction the defendant objected; but the instruction was given against the objection, and the defendants excepted, and on this exception the second writ of error was granted. Taney, C. J., again announced the opinion of the court, in which he formulated the instruction I have copied as containing what was decided in the former case; and he said that the instructions given on the second trial were complex; and further said: "We restate the former opinion of this court in this form because we presume it must have been misunderstood by the circuit court. And as it was not followed in the proceedings under the mandate, the judgment must be reversed, and the cause remanded, with directions to award a *venire facias de novo*."

The counsel for defendant in error refers to the case of *Wilson v. Smith*, 3 How. 763, and says: "It is a case which, in the absence of a knowledge of other decisions of the court, would have been supposed by every one to establish the rule as we are contending for it. There the paper was indorsed in blank, had been deposited for collection with an agent, and had been sent by the agent to a subagent, by whom it was collected. The owner of the draft was allowed to recover the amount of it from the subagent, notwithstanding the fact that

the agent was indebted to the subagent when the draft was received. The effort made in that case to distinguish it from the case of *Bank of the Metropolis v. New England Bank*, 1 How. 234, seems to be at least open to criticism." Let Taney, C. J., who delivered both the opinions cited, speak for himself, as he did for the whole court. On page 769 he said: "So far, therefore, as the question of privity is concerned, the case before us is precisely the same with that of *Bank of the Metropolis v. New England Bank*, 1 How. 234. In that case, the bills upon which the money had been recovered by the plaintiff in error were the property of the New England Bank, and had been placed by it in the hands of the Commonwealth Bank for collection, and were transmitted to the Bank of the Metropolis in Washington, where the bills were payable; and, upon referring to the case, it will be seen that the court entertained no doubt of the right of the New England Bank to maintain the action for money had and received against the Bank of the Metropolis, and the difficulty in the way of its recovery in the action was not a want of privity, but arose from the right of the Bank of the Metropolis to retain, under the circumstances stated in the case, for its general balance against the Commonwealth Bank. In that case, as in the present, the agent transmitting the paper appeared, by the indorsements on it, to be the real owner, and the party to whom it was transmitted had no notice to the contrary, and the money received was credited to the Commonwealth Bank. We think the rule very clearly established that whenever, by express agreement between the parties, a subagent is to be employed by the agent to receive money for the principal, or where the authority to do so may fairly be implied from the usual course of trade or the nature of the transaction, the principal may treat the subagent as his agent, and when he has received the money, may recover it in an action for money had and received." The proof in this case showed "that the draft or bill of exchange upon which the money was collected and received by the defendant was the property of the plaintiff; that it had been by them placed in the hands of their agent, David W. St. John, at Augusta, Georgia, for collection, and by him (St. John) forwarded to the defendant, St. John's agent, at Savannah, Georgia, for acceptance and collection; that it was accepted and paid to the defendant, by whom the proceeds were received, and credited to the account of St. John,

from whom the defendant received the draft or bill for collection, and who was indebted to the defendant at the time; that at the time said bill was so paid to the defendant, and by him credited to the account of St. John, he (St. John) had failed in business, and had departed this life; that he failed, and had not recovered his affairs at the time of his death, and was insolvent; that the credit for the amount of the bill carried by the defendant to St. John's account was made in payment of a previously existing debt due by St. John to the defendant." Now, as to another question in the case, Taney, C. J., said: "Another question has been raised by the agreement; that is, whether the defendant has a right to retain on account of the money due to him from St. John. . . . Upon this part of the case, as well as upon the question certified, we think the case of *Bank of the Metropolis v. New England Bank* decisive against the defendant. It appears from the statement that he made no advances, gave no new credit, to St. John, on account of this bill. He merely passed it to his credit in account. Now, if St. John had owed him nothing, upon the principles we have already stated the plaintiff would be entitled to recover the money; and we see no reason why he should be barred of his action because St. John was debtor to the defendant, since the case shows that he incurred no new responsibility upon the faith of this bill, and his transactions with St. John remained in all respects the same as they would have been if this bill had never been transmitted to him. In the case of the Bank of the Metropolis and the New England Bank, it appeared in evidence that there had for a long time been mutual dealings between these two banks in the collection of money for each other, and that balances were suffered to remain and credit given on the faith of the paper transmitted, or expected to be received, according to the usual course of their business with one another. And the court held that if credit had been so given, the party giving it had the same right to retain as if he had made an advance of money."

It seems to me that the chief justice has drawn a very clear and satisfactory distinction between that class of cases where the owner may collect the money in the hands of an agent, although he indorsed the bill in blank, and the other class where banks have mutual dealings with each other, and credit given on the strength of such paper so indorsed, in which it is held that the owner cannot recover. The case of *Sweeny v.*

Easter, 1 Wall. 166, fully sustains the cases theretofore decided by the supreme court on this subject. These decisions of the supreme court of the United States have been followed in the following cases, cited by counsel for plaintiff in error: *Rathbone v. Sanders*, 9 Ind. 217; *Millikin v. Shapleigh*, 36 Mo. 596; 88 Am. Dec. 171. The same principle, it seems to me, is clearly recognized in *First National Bank v. Gregg*, 79 Pa. St. 384, where it was held that where a note was made to plaintiff's order, indorsed by him, and sent through the house of Brady, a banker, "for collection and credit," Brady, by the indorsement, did not become the owner of the note and had no right to pledge it, or direct its proceeds to be credited to him, in payment of his indebtedness to the defendant; but that if the defendant had made advances or given new credit to Brady on the faith of the note, it would have been entitled to retain the amount out of the proceeds. The doctrine as laid down by the supreme court of the United States has not been adopted by all the states certainly. It is expressly repudiated in New York: *McBride v. Farmers' Bank*, 26 N. Y. 450, where Balcom, J., for the court, says, after deciding to the reverse of the principle: "It must be conceded that, according to the decisions of the supreme court of the United States in *Bank of the Metropolis v. New England Bank*, 1 How. 234, 6 How. 212, the defendants acquired a lien on the notes against Paul and Prachard, and the money received thereon, which enabled them to retain the same in satisfaction of the balance of account that the Canal Bank owed them. But the rule laid down by the federal court in that case has never been adopted in this state, and it is inconsistent with decisions of our courts, which have been regarded as correct expositions of the law for more than forty years."

As sustaining his view of the case, counsel for appellee also cites *Dickerson v. Wason*, 47 N. Y. 439; 7 Am. Rep. 455; *Dod v. Fourth National Bank*, 59 Barb. 265; *Dorchester & M. Bank v. New England Bank*, 1 Cush. 177; *Lawrence v. Bank*, 6 Conn. 529; *Union Bank v. Johnson*, 9 Gill & J. 297; *First National Bank v. Gregg*, 79 Pa. St. 384. This last decision, as I think I have shown, does not sustain the position. But few of the cases cited are those where banks had mutual dealings, as in the case in 1 Howard; and the cases in 6 Connecticut and 9 Gill & Johnson, were decided in 1827 and 1837, respectively, long before the case in 1 Howard.

But if we admit that these cases and many others oppose the principles decided by the supreme court of the United States, as we are bound by no decisions on the subject, either in Virginia or in this state, and being free to lay down the law as we believe it ought to be, we shall follow the supreme court of the United States, because in a case like this it commends itself to our judgments as just and equitable. Banks are a necessity. Merchants and other business men could not attend to their large business interest, spread as they are all over the country, without the facilities afforded them by the banking houses. It is most convenient for their collections. And the banks could not do business without their correspondents in different parts of the Union. They cannot send special messengers to remote points to collect drafts, bills, or notes, but they inclose them to correspondents next to where the drawees or makers live, and they are by such correspondents presented and collected. Such banks have mutual dealings with each other; and when they do, as a general thing both are trusted by their customers; and when such customers have negotiable paper maturing against persons at remote places, it is often the case that they indorse the paper in blank and the bank indorses it in blank, and sends it to its correspondent, who collects it, and gives the remitting bank credit for it; and the remitting bank, on being advised that the note has been paid to its correspondent, at once pays its customer or depositor. These transactions are constantly occurring, and no question is ever raised until one of the banks fails, as sometimes they do fail. Then it is that the customer who has indorsed the paper in blank, and thus misled the bank which collected his money, and that bank loses thousands of dollars by the very bank he has so often trusted; yet wants to recover from the collecting bank the money, when that bank never knew he had any interest in the paper, and had given credit therefor to the remitting bank. Under these circumstances, the original owner of the draft or note ought not to be permitted to recover from the collecting bank.

If the receiving and collecting bank, at the time of the mutual dealings with the bank sending paper, had notice that such bank had no interest in the bills or notes transmitted, and that it transmitted them for collection merely as agent, then the collecting bank would not be entitled to retain against the bank transmitting such paper for the general balance of the

account with such bank. And if the collecting bank had no notice that the bank sending the remittance was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the collecting bank is not entitled against the real owner, unless credit was given to the bank sending the paper, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks. But if, in the mutual dealings between two banks, the collecting bank regarded and treated the bank transmitting negotiable paper as the owner of such paper which is transmitted for collection, and had no notice to the contrary, and upon the credit of such remittance, made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the bank sending the remittance, to be met by the proceeds of such negotiable paper, then the collecting bank is entitled to retain against the real owner of the paper, for the balance of account due from the bank transmitting such paper.

And we hold, in the language of Taney, C. J., in the case in 1 Howard, varying the language to suit the facts in the case before us, that as there had been for several years mutual and extensive dealings between the Penn Bank and the Exchange Bank, and an account kept between them, in which they mutually credited each other with the proceeds of all negotiable paper transmitted for collection when received, and accounts were regularly transmitted from the one to the other, and settled upon these principles, and upon the face of the paper transmitted it always appeared to be the property of the respective banks, and the collecting bank had no notice that the transmitting bank did not own the paper, and such paper was transmitted by each of the banks on its own account, there is a lien for a general balance of account, no matter who may be the real owner of the paper.

It seems to me that these principles, thus established, are essential to the general good of a banking system, and are only the necessary protection that banks should have by the mercantile law; and as it is necessary for the protection of the banks, it is also essential to the public good. If it were not the law, the banks would find additional obstacles in their way. They would have to be extremely careful in transmitting paper, in the directions given, and in the correspondents

they selected, and they could not transact business with the facility they can under the wise and just rule established by the supreme court of the United States. It is really no hardship on the real owner of the paper. In many if not in most cases, he gives the draft, bill, or note to his own banker, with his indorsement in blank; and if it is known to be good, it is at once put to the credit of his account, indorsed in blank, or may be for collection, to the correspondent who collects it, and puts it to the credit of the sending bank; and at intervals the accounts between the banks are adjusted and balances remitted. If a customer does not wish to trust his own banker, he can restrict his indorsement "For collection," or, as in *Bank v. Bank*, 17 Reporter, 325, where the indorsement was: "For collection. Pay to the order of O. L. Baldwin, Cashier." It was held that the legal effect of the indorsement was to notify defendant that the plaintiff was the owner of the checks, and that the Newark Bank was merely its agent for collection, and that defendant was liable for the amount of the checks in a suit by plaintiff for money had and received.

Here there is nothing to indicate that the Penn Bank was not the owner of the Carroll sight draft. If Carroll had drawn that draft payable to his own order, and indorsed it "For collection," then it would have shown clearly that he had not parted with the ownership of it. But he directs the drawee to "pay to the order of Penn Bank." This would indicate that the Penn Bank, being designated the payee, owned the draft. It was drawn in favor of the Penn Bank, and would indicate that Carroll had received from the Penn Bank the value of the draft. The Penn Bank indorsed it, "Pay Exchange Bank, or order, for account Penn Bank." This would indicate clearly that the Penn Bank claimed to own the draft; and but for the mutual dealings and course of business between them, it would have been the duty of the Exchange Bank to have at once remitted proceeds, after collection, to the Penn Bank. But under the law we have stated, it had the right to place it to the credit of the Penn Bank, and hold it for any balance due it. This case comes clearly within the rule laid down in 1 Howard and 6 Howard.

But it is insisted that in the letter transmitting the draft is the abbreviated "no protest"; thus, "no prin." It may mean this; I cannot tell. It is not explained in the record, and if it means "no protest," it is too slight evidence of

ownership in some other than the Penn Bank to show such fact.

The judgment of the circuit court is reversed, and judgment here entered for the defendant.

BANKER'S LIEN UPON PAPER indorsed for collection by a corresponding bank to cover a balance exceeding the amount of such paper, due from their correspondent upon the latter's failure: *Millikin v. Shapleigh*, 36 Mo. 596; 88 Am. Dec. 171, and note 174; *Dickerson v. Wason*, 47 N. Y. 439; 7 Am. Rep. 455; *Masonic Savings Bank v. Bangs*, 84 Ky. 135; 4 Am. St. Rep. 197, and note on the subject 203; see also *Continental etc. Bank v. Weems*, 69 Tex. 439; 5 Am. St. Rep. 85.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

COLVIN v. REPUBLICAN VALLEY LAND ASSOCIATION AND LINCOLN LAND COMPANY.

[23 NEBRASKA, 75.]

COPY OF DEED AS EVIDENCE. — Certified copy of deed, to be admissible, need not show by scroll or otherwise that the original was under the seal of the corporation making it, if its recitals are to the effect that it was under the corporate seal.

POSSESSION TO BE ADVERSE, so as to set the statute of limitations in operation, must be actual, open, and continuous, accompanied by an intention, under claim of title, on the part of the occupant to hold the land as owner. Though exclusive and hostile to the real owner in appearance, it cannot be effectually adverse, unless accompanied by the intent on the part of the occupant to make it so. Naked possession, unaccompanied with any claim of right, does not constitute a bar, but inures to the benefit of the real owner.

IRRELEVANT EVIDENCE. — When there is nothing in the issues presented to warrant the proof offered, it is properly excluded.

J. M. Hamilton, and Hamilton and Trevitt, for the plaintiff in error.

Marquett, Deweese, and Hall, and W. S. Morlan, for the defendants in error.

REESE, C. J. This was an action in ejectment, instituted by defendants in error against plaintiff in error for the possession of the southeast quarter of the southwest quarter of section 15, township 4, range 23 west, in Furnas County.

The petition is in the usual form.

Plaintiff in error filed his answer, consisting of three counts:

1. A general denial of the allegations of the petition; 2. That

the plaintiffs' alleged cause of action did not accrue within ten years next before the commencement of the suit; and 3. That on September 30, 1873, plaintiff in error entered into possession of the premises in dispute, as owner thereof, and has continued in open, notorious, adverse, and exclusive possession thereof ever since, and has cultivated and improved the same.

There was a jury trial, which resulted in a verdict in favor of defendants in error.

Plaintiff in error brings the cause to this court by petition in error, and assigns for error: 1. The court erred in admitting in evidence certain deeds introduced by defendants in error showing their claim of title; 2. The court erred in giving certain instructions to the jury; 3. The court erred in refusing to give certain instructions asked by plaintiff in error; 4. Errors of law occurring upon the trial; and 5. That the verdict is not sustained by sufficient evidence.

At the commencement of the trial, the following stipulation was entered into by the parties to the suit: "It is hereby stipulated and agreed by and between the parties hereto that certified copies of certain instruments may be offered in evidence without proof of the loss of the originals, subject only to the objections that the originals would be subject to, the plaintiffs admitting that they contained all that the originals contained."

The property in dispute was conveyed by plaintiff in error to one D. N. Smith, on the thirtieth day of September, 1873. Smith conveyed it to the Republican Valley Land Association, the deed bearing date March 28, 1874. The Republican Valley Land Association, on the twenty-ninth day of December, 1879, conveyed an undivided half-interest in the property to A. E. Touzalin, trustee. On the 5th of May, 1880, Touzalin conveyed the undivided half-interest to the Lincoln Land Company.

The principal objection to the introduction of the copies of the deeds is made to that of the Republican Valley Land Association to Touzalin. The ground of this objection is, that the certified copy of the record does not show that the conveyance was under the seal of the corporation making the conveyance. This deed is executed by J. S. Schramm, president of the Republican Valley Land Association, and recites that it is made under the seal of said association, but there is nothing on the certified copy, in the form of a scroll or other-

wise, to indicate that the seal of the association was actually affixed to the deed, in accordance with the recital therein contained.

In *Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646, a question somewhat similar to the one presented in the case at bar arose upon a certified copy of a deed being introduced in evidence, which did not contain any proof, by a scroll or otherwise, that the officer before whom the acknowledgment was taken actually affixed his seal to the certificate of acknowledgment. It was there held that the deed was admissible in evidence, and that it was not necessary that a certified copy of the recorded deed should show that the impression of the official seal of the officer who took the acknowledgment was affixed thereto, if it be stated in the body of the certificate of acknowledgment that it was certified under such official seal.

A similar question arose in *Geary v. City of Kansas*, 61 Mo. 378, and it was there held that a statement in the body of the certificate, that the officer who made it affixed his seal of office, raised the presumption that such was the fact, and that it was not necessary that the record copy should contain a copy of the seal, nor any indications thereof by scroll.

In *Smith v. Dall*, 13 Cal. 510, a question quite similar to the one in this case was presented. The deed was under seal, and recorded on the day of its execution, but on the books of the record there was no copy of the seal or mark indicating that there was a seal to the instrument. It was held that it was not necessary that the seal should be copied upon the record, but that it was enough if it appeared from the record that the deed copied was under seal.

The question, then, does not arise as to whether the deed from the Lincoln Land Association to Touzalin was under seal or not, or whether the seal of the corporation was thereto affixed, but whether it was necessary that the certified copy of the record should show that fact in order to its admissibility. Under the authorities cited, we think it was not necessary, and there was no error in admitting the copy of the deed in evidence.

The facts in this case, as shown by the record, may be briefly stated to be, that in the year 1873 plaintiff in error conveyed the land in question to D. N. Smith. At that time it was unfenced, but somewhat improved, and a crop standing thereon. Plaintiff in error was in possession. The crop was

reserved from the sale. By the testimony of plaintiff in error, it appears that at the time he conveyed the land to Smith there was some talk about plaintiff in error remaining in possession, but just what that conversation was is not clear, plaintiff's memory being somewhat defective and Smith being dead. It was known by plaintiff in error that Smith was not purchasing the land for farming purposes, and nothing was said as to when Smith would require the possession; at least, no definite time was fixed. Plaintiff in error remained in possession until the commencement of this suit, Smith not objecting so long as the title remained in him. The taxes have all been paid by Smith, or his grantees, plaintiff in error having paid nothing since his conveyance. I think it may be said to appear reasonably clear, from the record, that plaintiff in error retained the possession, by Smith's consent, without any purpose of asserting ownership, or claiming to own it, until after the year 1881.

On his cross-examination, his attention is called to the verification of a petition in a case named, which occurred in the year 1881 or 1882. He was asked if at that time he had made up his mind to claim or keep the land. His answer was, "I don't know that I had positively." After that time his attention appears to have been called to the fact that some decision upon the question of adverse possession had been made by this court, when he seems to have decided to assert his ownership, but no notice of any claim or right to the land, or that his possession was other or different from that retained by the consent of Smith, was ever given to defendants in error. So far as appears from the record, his possession was with the consent of defendants in error, or their grantors, without any intention upon his part to assert ownership.

The real question presented in the case is, Was such possession a sufficient bar to the present action? We think clearly not. The possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention on his part to hold the land as the owner of it. It must have been under a claim of ownership. No matter how exclusive and hostile to the real owner in appearance, it cannot be effectually adverse unless accompanied by the intent on the part of the plaintiff in error to make it so. A naked possession, unaccompanied with any claim of right, will never constitute a bar, but will inure to the advantage of the real owner. As was said in *Ewing v. Burnet*, 11 Pet.

41, "It is the intention which affects the character of the entry and possession." And as was said in *McCracken v. City of San Francisco*, 16 Cal. 635, "The statute of limitation runs only in favor of parties in possession claiming title adverse to the whole world." There can be no doubt but that, after the conveyance to Smith, plaintiff in error retained possession with the understanding upon his part that such possession was entirely agreeable to Smith; and while he says in his testimony that it was his purpose to hold it as long as he could, yet we found nothing which would show a purpose to hold as owner, and against Smith's title; the statute of limitations, therefore, did not run in his favor, and it must be presumed that his possession was in accordance with or subservient to the title conveyed to Smith: *Jackson v. Parker*, 3 Johns. Cas. 124; *Thompson v. Pioche*, 44 Cal. 508; *Campau v. Lafferty*, 50 Mich. 114; *Greenhill v. Biggs*, 85 Ky. 155.

It is contended that the court erred in giving instructions to the jury upon its own motion and upon the request of defendants in error, and in refusing to give instructions asked by plaintiff in error. These instructions are quite lengthy, and it is not deemed necessary to copy them here. It must be sufficient to say that the views taken by the trial court, as expressed in the instructions given and those refused, correspond with those here expressed, and there was no error.

Upon the trial, it was sought to prove by plaintiff in error, upon the witness-stand, that he had not received the consideration for which he conveyed the land; but this testimony, upon objection, was excluded, and we think rightly, for the reason that there was nothing in the issues presented which would warrant any such proof. The simple questions presented were the title of the defendant in error and the plea of the statute of limitations. No equities were presented by the answer, and therefore none could be proven. The judgment is therefore affirmed.

ADVERSE POSSESSION, NATURE OF TO SET IN OPERATION STATUTE OF LIMITATIONS: *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71, note 74; *Woods v. Montecito etc. Co.*, 84 Ala. 560; 5 Am. St. Rep. 393; *Sherin v. Brackett*, 36 Minn. 152.

CERTIFIED COPY OF DEED, when admissible in evidence: *Chamberlain v. Bradley*, 101 Mass. 128; 3 Am. Rep. 331; *Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 106, note 124.

EVIDENCE IS INADMISSIBLE to prove facts not alleged: *Shilling v. Carson*, 27 Md. 175; 92 Am. Dec. 632; *Maynard v. Fireman's Fuel Ins. Co.*, 34 Cal.

48; 91 Am. Dec. 672; *Finley v. Quirk*, 9 Minn. 194; 86 Am. Dec. 93, and note; *Boswell v. Goodwin*, 31 Conn. 74; 81 Am. Dec. 169.

PROOF THAT SEAL AFFIXED TO DEED IS CORPORATE SEAL IS UNNECESSARY when the deed is shown to have been duly executed by one having authority: *Phillips v. Coffee*, 17 Ill. 154; 63 Am. Dec. 357.

SPECKLEMEYER v. DAILEY.

[23 NEBRASKA, 101.]

FOREIGN JUDGMENT—PLEADING JURISDICTION.—In an action in Nebraska on a judgment rendered by the circuit court of Boone County, Indiana, it is not necessary to allege in direct terms that the foreign court is a court of general jurisdiction, nor that jurisdiction was acquired by personal service of summons, nor that judgment was rendered as required by statute. The court in which the action is brought will take judicial notice that the court rendering the judgment had general jurisdiction.

J. N. Rickards and D. P. Newcomer, for the plaintiff in error.

Agee and Stevenson, for the defendants in error.

REESE, C. J. This action was commenced in the district court of Webster County by defendants in error against plaintiff in error, and was founded upon a judgment rendered by the circuit court of Boone County, Indiana. The petition is in the usual form, with the exceptions hereafter referred to, for declaring upon judgments rendered by the courts of general jurisdiction in other states.

Plaintiff in error filed a general demurrer, which was overruled, and failing to answer further, a judgment was rendered for the amount due upon the judgment record referred to in the petition. Upon the overruling of the demurrer, plaintiff in error excepted, and now prosecutes error in this court, assigning for error the ruling of the district court upon such demurrer.

That part of the petition to which our attention is especially directed is as follows: "The said plaintiffs complain of the said defendant for that, on the twenty-second day of February, 1878, the said plaintiffs recovered a judgment against said defendant as administrator of the estate of Stephen Specklemeyer, then deceased, and also against said defendant, in his own right and person, in the Boone County circuit court, in the state of Indiana, in the sum of \$1,146.66, and \$12.95 costs of suit, in an action then pending in said court,

wherein the said Marcus C. Dailey and Samuel S. Dailey were plaintiffs, and the said Levi J. Specklemeyer, as administrator of Stephen Specklemeyer, deceased, and said Levi J. Specklemeyer was defendant. Said judgment has not been paid, nor any part thereof, except the sum of \$126.49, which was paid on said judgment on the first day of December, 1884, . . . wherefore said plaintiffs pray judgment," etc.

The question presented is as to the sufficiency of the petition in not alleging in direct terms that the circuit court of Boone County, of Indiana, is a court of general jurisdiction, nor was it alleged jurisdiction was acquired by personal service of summons, nor that judgment or determination was duly made or given as required by section 127 of the Civil Code.

This contention is based upon a decision of this court in *Tessier v. Englehart*, 18 Neb. 167. In that case, the judgment declared on in the answer had been rendered by the superior court of Cook County, Illinois. In writing the opinion, the then chief justice, Cobb, uses the following language: "This defense was demurrable in not alleging either that the superior court of Cook County, Illinois, is a court of general jurisdiction, or that it had jurisdiction of the subject-matter of the judgment or of the person of said defendant. Said court being a foreign tribunal in the sense of the law and authorities, such allegation was necessary, and its absence could be taken advantage of, either by demurrer or by objection to the introduction of testimony under that paragraph of the answer, and perhaps in other ways."

We have no doubt of the correctness of that decision, but do not deem it authority in this case. There is nothing in the title of the court referred to which, by its terms, would indicate that it is a court of general jurisdiction, and therefore it was necessary that the facts conferring such jurisdiction should be pleaded. But in the case at bar the allegation that the judgment was rendered by the Boone County circuit court, in the state of Indiana, was a sufficient allegation that the court rendering the judgment was a court of general jurisdiction.

This question was before the supreme court of the state of Wisconsin, in *Jarvis v. Robinson*, 21 Wis. 523, 94 Am. Dec. 560, and it was there held that the allegation in the petition that the judgment upon which the action was brought was rendered in the circuit court of Kane County, state of Michigan, was a sufficient allegation that the court was one of

general jurisdiction. The following language occurs in an opinion written by Chief Justice Dixon: "I think where the title clearly indicates a court of general jurisdiction it must be so understood, and is equivalent in pleading to express averment of that fact. Such is the title here. We all know that the circuit courts of the several states are courts of general jurisdiction, as well as we know that the courts of the justices of the peace are not. But why should judges assume a degree of ignorance on the bench which would be unpardonable in them when off of it?"

In *Shotwell v. Harrison*, 22 Mich. 410, it was decided that the courts of Michigan would take judicial notice that the supreme court of Massachusetts was a court of record. And in *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446, it was decided that where a petition set out a judgment recovered in the court of common pleas in Pennsylvania, the courts of Kansas would take judicial notice of the constitutions of sister states, and that the court of common pleas was a court of general jurisdiction.

We therefore hold that the allegation of the petition was sufficient in this respect, and that the demurrer was properly overruled.

The judgment of the district court is therefore affirmed.

COMPLAINT ON FOREIGN JUDGMENT need not allege that the court rendering it had jurisdiction either of the cause or the parties. Such judgment, if complete and regular on its face, is *prima facie* valid: *Gunn v. Peakes*, 36 Minn. 177; 1 Am. St. Rep. 661, note 663; *Jarvis v. Robinson*, 21 Wis. 530; 94 Am. Dec. 560; *contra*, *Gebhard v. Garnier*, 12 Bush, 321; 23 Am. Rep. 721.

MORGAN v. DINGES.

[23 NEBRASKA, 271.]

VENDOR AND VENDEE — CANCELLATION OF DEED FOR FRAUDULENT REPRESENTATIONS BY VENDEE. — Where parties to a deed stand on an equal footing, expressions of opinion as to the value of the property, whether true or false, will not constitute fraud. But if the purchaser resides near the property, and has full knowledge of its situation and approximate value, and the owner resides in another state, without any knowledge on the subject, opinions as to value by the purchaser, which he knows to be much below the real value of the property, and statements made by him that the owner's title has been abrogated by tax sales, will be sufficient, where the property was purchased for a grossly inadequate consideration, to set aside and cancel the deed.

VENDOR AND VENDEE — CANCELLATION OF DEED FOR MISREPRESENTATIONS BY VENDEE. — Where the purchaser does any act, or makes any declaration, with the intention of misleading the seller, and preventing him from ascertaining the real situation of the property, and at the same time conceals from him a material fact upon which he relies, and of which the vendee has knowledge, the latter is guilty of fraudulent deception, for which the deed may be canceled.

Sawyer and Snell, for the appellant.

Billingsley and Woodward, and G. M. Lambertson, for the appellee.

MAXWELL, J. The plaintiff alleges in her petition that she resides in Denver, Colorado, and has been absent from Lincoln since 1874; that she was the owner of lot 2, in block 31, in the city of Lincoln, which lot was then worth between six and eight thousand dollars; that for the purpose of inducing her to sell said lot for a wholly inadequate consideration, Dinges called on her at her home in Denver, with his attorney, and concealed from her the true value of the lot, and falsely and fraudulently represented that the value of the lot, exclusive of the house, was not more than two or three hundred dollars; that her title had been extinguished by reason of a tax deed, but in order to clear up a flaw, he wished her signature to a deed as a simple formality; that the attorney of Dinges, at his instigation and in his presence, professionally advised her that under the Nebraska law and decisions her title had been extinguished by the tax deed, when both Dinges and the attorney knew that such was not the fact; that Dinges falsely represented that he was the holder of said tax title, and that he would bring suit against her, and put her to great trouble and expense, and that she would be arrested and brought to Lincoln, unless she consented to give him a deed to the lot for one hundred dollars; that on account of sickness in her family, she had no opportunity to consult with an attorney as to her rights; that she was wholly ignorant of her rights, except as advised by Dinges and his attorney; that she had no knowledge of the real value of her lot, and had heard nothing concerning its value for a number of years; that she was distressed by sickness in her family, by poverty, and the need of money, and, relying wholly and implicitly upon the statements of Dinges and his attorney, for one hundred dollars she executed a warranty deed, with full covenants except as to taxes; that Dinges is not and never was the owner of a tax title to said lot, and never had any contract or arrange-

ment by which he could buy in said tax title, if one existed; that if there is any tax title to said lot, the same is void, and her right of redemption not extinguished; all of which was well known to Dinges and his attorney at the time they told her to the contrary; and that all the statements made by Dinges were made with the intent to cheat and defraud her out of her property, by taking advantage of her ignorance and poverty, want of knowledge of the value of the lot and her rights therein, and her distress of mind consequent upon long sickness in the family.

The defendant filed a general demurrer to the petition, which was overruled, to which the defendant excepted, and now assigns the overruling of the same for error.

The demurrer was properly overruled. Where parties stand on an equal footing, expressions of opinion as to the value of certain property will not usually be considered so material that misstatements will constitute fraud. But where the purchaser resides near the property in this state, and has full knowledge of its situation and approximate value, and the owner resides in another state, without any knowledge on that subject, expressions of opinions as to value by such purchaser, which he knows to be much beneath the true value of the property, and statements made by him that the owner's title has been abrogated by reason of a sale of the property for taxes, will be sufficient, where the property was purchased for a grossly inadequate consideration, to set aside the deed. The petition, therefore, does state a cause of action.

Upon the overruling of the demurrer, the defendant filed an answer, in which he admits the execution of the deed; second, alleges that the lot had no market value; third, that at the time of said purchase, said lot was in the adverse possession of one Herman Koenig, who claimed to be the owner of the same by reason of a tax title issued in 1875, and adverse possession thereunder for more than ten years.

The plaintiff filed a reply, which it is unnecessary to notice.

The testimony tends to show that early in February, 1887, Herman Koenig was in possession of the lot in question under a tax deed. The testimony, however, fails to show that Mr. Koenig had been in possession a sufficient length of time to give him title by adverse possession. In fact, it shows that he had not had such possession for the requisite time. The defendant applied to Mr. Koenig to purchase the lot, and was informed by him as to the state of his title, and it was ver-

bally agreed that he would sell his interest to the defendant for the sum of two thousand dollars, it being understood that the legal title was in the plaintiff. The testimony shows that the lot at this time was worth from two thousand five hundred to six thousand dollars, the fair value apparently being about five thousand dollars. The defendant thereupon commenced a search for the plaintiff, and after considerable difficulty, found her in Denver. At Denver, the defendant employed an attorney, and called upon the plaintiff to endeavor to purchase the lot in question. The plaintiff testifies that the attorney, in the presence of the defendant, said, "His [the defendant's] deed was better than mine; my deed was no good whatever; that after the lot was sold for taxes, that I could n't redeem it or claim it; that all he wanted was my signature to his deed; that he just wanted a link in there, and that my deed was n't any good anyway, and that he wanted my signature. He wanted to know why I had n't redeemed it. I told him that I had been sick, and that sickness was the reason why I had n't redeemed the property, and that I have n't the money." He said: "That was no excuse. Do you know what I can do with you for not clearing up this title? I can arrest you, and take you to Lincoln, and make you clear up this tax title, and it will cost you more than the property is worth. We can put off this suit from time to time till you won't gain anything."

The attorney testifies on that point: "I first introduced myself to the plaintiff, Mrs. Morgan, as an attorney from the office of Patterson and Thomas, and introduced Mr. Dinges, the defendant, to her, and told her that we wanted to have a talk with her about a certain lot in the city of Lincoln, of which she was at one time the owner. She said that she had been the owner of the lot about which we were speaking, and I then told her that I had been informed that she failed to pay the taxes on that lot for a long space of time; I think I said for ten or fifteen years; and I also told her that if that was the case, in all human probabilities somebody had the title to that lot through a tax sale. She told me that it was true that she had not paid the taxes on the lot for a long time, but said that she had been unable to do so, on account of sickness in her family, and on account of lack of money to pay the taxes. I told her that of course that was very unfortunate, but at the same time, in law, that would be considered no excuse for not paying the taxes, and that, as I had before stated, the prop-

erty had in all human probability been sold for taxes, and a deed given, and that what we wanted to know was the least she would take to give a deed for whatever interest she might have remaining in that property in order that the owner of the tax sale might have a clear title of record. She stated to us that she had heard, through a gentleman in Lincoln, — I think his name was Brown, — that the property had been sold for taxes; and she further said that she received word from Lincoln that it would be necessary for her to come there in order to reclaim the property."

He further testified: —

"Q. Did you at any time or in any manner inform or threaten the plaintiff that if she did not sell her interest in this lot that you would arrest her, and take her to Lincoln, and make her clear up this tax title, and that it would cost her more than the property was worth?

"A. No; I did not. I told Mrs. Morgan, however, that the owner of the tax title could bring a suit against her to compel her, or rather not to compel her, but to clear a cloud from his title by reason of the fact that the record showed her to be the owner in fee-simple. And I did say to her at that time that she would be put to considerable cost and expense to defend that suit in case the holder of the deed should bring such a suit. I would like to continue that answer, but I never in any way or manner said or intimated to Mrs. Morgan that it would be possible, under any circumstances or conditions, to arrest her, or to bring any criminal charge against her whatever.

"Q. Was anything said by either you or the defendant, at any conversation with the plaintiff, in regard to her arrest, or of the power of the defendant to compel her to go to Lincoln, Nebraska?

"A. Nothing, except as I have already stated, that I told her a suit could be brought to clear a cloud from the title."

He also testified as follows: —

"Q. Did either you or the defendant state to Mrs. Morgan what, in your opinion, the lot was worth at this time?"

"A. No; I think not. Mrs. Morgan asked us what we thought the property was worth, and not knowing anything about it myself, I could not tell; but Mr. Dinges, the defendant, told her that some time ago, I think he said about two years and a half ago, the property had been sold for eight hundred or nine hundred dollars, I am not sure which now."

"Q. Did either you or the defendant inform or advise the

plaintiff that her interest in the property was of no value whatever?"

"A. Not in that way. I did tell Mrs. Morgan that if no taxes had been paid on the place by her for the past fifteen years, that in all human probability she had no more title to the premises than I have."

The testimony also shows that the plaintiff was unaccustomed to the transaction of business, and knew nothing of the real value of this property. She states, and it is apparent from the record, that she had been unable, from poverty, to pay the taxes on the lot in question; that her children had been sick with the measles, and she lived at least one mile from the business portion of the city of Denver, and from an attorney's office; that her children were too young to leave alone, and that her husband was absent during the day, in the employ of the railroad company, and personally knew nothing of the value of the lot. The plaintiff seems to have supposed that the attorney who appeared with the defendant was a member of the law firm of Patterson and Thomas, and claims to have had great confidence in his statements. However this may be, the defendant and his attorney, when asked by the plaintiff as to the value of the lot, concealed the fact as to its true value, and, by indirection and innuendo, in effect stated that her interest had passed by the tax sale, and was of little or no value whatever. These statements, so far as this record shows, were false. The amount of taxes due on the lot was somewhat in excess of three hundred dollars, but no valid tax deed has been shown. The statements, therefore, were wholly unauthorized. The case, in some of its facts, is similar to that of *Swimm v. Bush*, 23 Mich. 99.

In that case, the defendant owned a farm near the city of Owosso; the plaintiff resided near said farm, and was well acquainted with its value. Bush was a resident of Pennsylvania. In May, 1868, four persons had written to Bush to negotiate for the purchase of the farm, but nothing had been done to close with them. Early in June of that year, Swimm went to see Bush, and when asked concerning the value of the land, said it was not worth four thousand nor three thousand dollars, and that he had not expected to pay more than two thousand eight hundred dollars, but that he would give three thousand, as his wife was born on it, and had an affection for it; an offer of three thousand for it had been made in one of the letters written by one Martin to Bush. Swimm pur-

chased the farm for three thousand dollars, paying four hundred dollars down, with a provision for adequate security upon the making of the deed. The testimony showed the land at that time to be worth four thousand dollars, as Swimm well knew. The court set the contract aside, as having been obtained by fraud, and taxed all the costs to Swimm. The court say, page 10: "It is just as clear that Swimm knew this, and gave him the answers and made the representations in order to induce him to believe he was getting the outside value of the land, and that it would not be safe to lose a good offer. The representations were of the greatest materiality, and referred to the matters on which any sensible man would found his conclusions. The sale was the result of nothing but the urgency and deceit of Swimm, and such statements, coming from a man of undoubted character (as Swimm was naturally assumed to be, under the circumstances), might have deceived a man of more experience than Bush."

In *Turner v. Harvey*, Jacob, 178, Lord Eldon adverts to the general principle "that parties dealing for an estate have a right to put each other at arm's-length; and that if the purchaser knows that there is a mine upon the estate, and the vendor makes no inquiry, the former is not bound to give him information thereof." He says, however, "Very little is sufficient to affect the application of that principle; if a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate."

On commenting on this rule in *Livingston v. Peru Iron Co.*, 2 Paige, 393, Chancellor Walworth says: "Certainly if the purchaser does not act, or makes any declaration with the intention of misleading the seller and preventing him from ascertaining the real situation of the property, and at the same time conceals from him a fact which he knows to be material, he is guilty of fraudulent deception."

To the same effect are *Haygarth v. Wearing*, L. R. 12 Eq. 320, 328; *Rawlins v. Wickham*, 3 De Gex & J. 304; 1 Giff. 355; *Martin v. Jordan*, 60 Me. 531; *Coon v. Atwell*, 46 N. H. 510; *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523; *Van Epps v. Harrison*, 5 Hill, 63; 40 Am. Dec. 314; *Reid v. Flippen*, 47 Ga. 273; *Morehead v. Eades*, 3 Bush, 121; *Sieveling v. Litzler*, 31 Ind. 14; *Harvey v. Smith*, 17 Id. 272; *Davis v. Jackson*, 22 Id. 233; *McFadden v. Robison*, 35 Id. 24; *Allin v. Millison*, 72 Ill. 201; *Neil v. Cummings*, 75 Id. 170; *Faribault v.*

Sater, 13 Minn. 223; *Gifford v. Carvill*, 29 Cal. 589; *Cruess v. Fessler*, 39 Id. 336.

The defendant, while claiming to the plaintiff that she had no title, showed his insincerity by obtaining from her a warranty deed with covenants against all encumbrances except taxes and tax liens. This deed was prepared by his attorney, evidently with his consent and concurrence. The judgment of the district court having been for the plaintiff, it is clearly right, and is affirmed.

AVOIDANCE OF CONVEYANCE OF LAND by the grantor for misrepresentations of material facts made by the grantee: *Harris v. Tyson*, 24 Pa. St. 347; 64 Am. Dec. 661, note 667; *Barnard v. Duncan*, 38 Mo. 170; 90 Am. Dec. 416, note 425; *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448, note 463; *Lesiter v. Mahan*, 25 Ala. 445; 60 Am. Dec. 530, and note 533.

EISELEY v. SPOONER AND LYMAN.

[23 NEBRASKA, 470.]

LANDLORD AND TENANT. — CONVEYANCE OF LEASED PREMISES CARRIES WITH IT THE RIGHT TO ALL RENTS subsequently falling due.

DEED. — AN EXCEPTION IS A WITHDRAWAL from the operation of the grant of some part of the thing granted, and if valid, the title to the thing excepted remains in the grantor, as if no grant had been made.

DEEDS. — RESERVATION IN A DEED is of some new thing issuing out of what is granted, and while not affecting the title to what is granted, may reserve to the grantor a right to the use or enjoyment of a part thereof.

CONVEYANCES OF LAND, under the Compiled Statutes of Nebraska of 1887, chapter 73, sections 50 to 53, pass all interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used; and in construing them it is the duty of the court to carry into effect the true intent, as far as such intent is consistent with law.

Brome, White, and Mapes, for the plaintiff in error.

W. H. Munger and E. F. Gray, for the defendants in error.

REESE, C. J. On the twenty-ninth day of April, 1885, C. F. Eiseley leased to George Weigle certain real estate for a term beginning on the first day of March, 1885, and ending on the first day of March, 1886. The rent reserved was two fifths of all wheat, barley, rye, oats, and corn raised on the premises during the season of 1885, to be delivered on or before January 1, 1886. On the thirtieth day of April, 1885, Eiseley, the landlord, sold, and by warranty deed conveyed, the real estate to defendants for the consideration of nine thousand dollars. The land is conveyed "subject to a lease which expires March

1, 1886." This language immediately follows the description of the property. At the time of the execution of this deed the tenant was in possession of the real estate. During the year 1886, the share of the crop due to the landlord was delivered to defendants, and this suit is brought by the vendor, Eiseley, for the value of the rent collected by them. The cause was tried by the district court, which resulted in a judgment in favor of defendants. Plaintiff brings error to this court.

The only question involved in the case is the construction to be placed upon the language of the deed referring to the lease. Was the rent reserved by the terms of the lease, and which was to accrue after the conveyance, reserved to the grantor, by the language used in the deed? or was the grantee entitled thereto?

It is contended by plaintiff in error that the language used constitutes an exception out of the grant; that, fairly construed, it means that the grantor reserves the use of the premises conveyed until the 1st of March, 1886; while upon the part of defendants in error it is insisted that the words are not an exception, because nothing is excepted or taken out of the thing conveyed, nor yet a reservation, because nothing new is created and reserved to the grantor out of the thing so conveyed; that it is merely a recital of a prior estate, then vested in a third party, and, to this extent, a qualification of the covenant of warranty contained in the deed.

An exception is said to be a withdrawal from the operation of the grant of some part of the thing granted, while a reservation is of some new thing issuing out of what is granted. Thus where real estate is granted, a portion thereof may be excepted from the terms of the conveyance, or the trees or woods growing thereon. If the exception be valid, the title to the thing excepted remains in the grantor the same as if no grant had been made. A reservation, while not affecting the title to the thing granted, may reserve to the grantor a right to the use or enjoyment of a portion thereof, as an easement, the right to pass over, or the like. Applying these rules to the deed in question, we are led to conclude that the purpose of the language used was a limitation upon the title conveyed, and upon the covenants of warranty. It conveyed the land, subject to whatever rights the tenant might have under his lease, but reserved to plaintiff no additional or

greater right than he would have had had the words referred to been omitted.

By the provisions of our statutes, every conveyance of real estate shall pass all interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used: Com. Stats. 1887, c. 73, sec. 50. And in the construction of conveyances of real estate, or interest therein, it shall be the duty of the courts to carry into effect the true interest (intent) so far as such intent is consistent with the rules of law: Id., sec. 53.

We think it cannot be questioned that, as a general rule, the conveyance of a reversion carries with it the rent accruing and becoming due after such conveyance. Upon this we think the authorities are in harmony, although a different rule would apply where the rent was due and remaining unpaid: See *Moffett v. Armstrong*, 40 Iowa, 484; *Abercrombie v. Redpath*, 1 Id. 111; *Van Driel v. Rosierz*, 26 Id. 575; *Townsend v. Isenberger*, 45 Id. 670; *Wilkins v. Vashbinder*, 7 Watts, 378; *Cobel v. Cobel*, 8 Pa. St. 342; 2 Bouvier's Law Dict., tit. Rent.

The lease to Weigle, being nothing more than a grant of the temporary possession of the land in consideration of the rent reserved, gave him the right of such possession during the term of the lease or grant; but while it is true that defendants could not have questioned his right to such possession had the deed contained no limitation, yet plaintiff would have been bound, upon the covenants of his warranty, to account to defendants for the value thereof had not the clause been inserted in the deed. Following, therefore, the direction of section 53 of the statutes above referred to, in so construing the deed as to carry into effect the true intent of the parties, we must hold such to have been the purpose of the limitation.

We have carefully considered all the authorities referred to by plaintiff, as well as others bearing upon the application of the principle insisted upon by him, yet we are unable to adopt the conclusion reached by his counsel, although the case cannot be said to be entirely free from doubt.

The judgment of the district court is affirmed.

RENT RESERVED IN LEASE passes with the land by a conveyance of the latter: *Mussey v. Holt*, 24 N. H. 248; 55 Am. Dec. 234, and note 241; *Miller v. Stagner*, 3 B. Mon. 58; 38 Am. Dec. 178.

EXCEPTION IN DEED, WHAT IS: *Rich v. Zeilsdorff*, 22 Wis. 544; 99 Am. Dec. 81; see also *Wait v. Baldwin*, 60 Mich. 622; 1 Am. St. Rep. 551.

RESERVATION IN DEED, WHAT IS: *Rich v. Zeilsdorff*, 22 Wis. 544; 99 Am. Dec. 81; *Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399.

IN CONSTRUCTION OF DEEDS, FIRST RULE IS, that the intention of the parties will be effectuated if possible; and the second is, that this intention is to be ascertained from all their terms, considered together: *Lowdermilk v. Bostick*, 98 N. C. 299; *Bradley v. Zehmer*, 82 Va. 685; yet whatever the intention may be, nothing will pass by a deed except what is described therein: *Thayer v. Finton*, 108 N. Y. 394.

MATHEWS v. TOOGOOD.

[23 NEBRASKA, 536.]

COUPONS, DECISIONS RELATING TO THE ALLOWANCE OF INTEREST UPON, cited by the court.

INTEREST UPON INTEREST, decisions respecting the allowance of, cited by the court.

INTEREST UPON A COUPON, OR INTEREST NOTE, is forbidden by the statute of Nebraska, in all cases where the allowance of such interest, though expressly agreed to be paid, would result in the payee's receiving a greater sum than ten per cent per annum on the amount of his loan.

Dawes, Foss, and Stephens, for the plaintiff in error.

Abbott and Abbott, for the defendants in error.

REESE, C. J. The original action in this case was instituted in the district court of Saline County, for the purpose of foreclosing a mortgage given to secure a promissory note for four thousand four hundred dollars, dated May 2, 1885, and due May 2, 1887, with interest from date at the rate of ten per cent per annum, payable semi-annually, as per coupons attached to the note. There is one interest coupon remaining attached to the note, which is as follows:—

"\$220.

May 2, 1887.

"We promise to pay to Luther P. Mathews, or order, two hundred and twenty dollars, being interest to that date on my note of four thousand four hundred dollars. This interest note to draw ten per cent per annum from maturity."

Upon trial before the district court, a decree was rendered in favor of plaintiff in error for the full amount claimed, excepting the interest demanded upon the coupon note after its maturity. This the court refused to allow to the plaintiff, and this action of the district court is now assigned for error.

There was no appearance at the hearing in this court by defendants in error, and in the examination of the question

before us we have been without the benefit of a brief upon that side of the case.

In the examination of the question involved, we find a sharp conflict of authorities, and it is impossible to harmonize them. We here give a brief statement of the holdings of the courts upon some of the questions bearing upon this case.

The following cases hold, substantially, that coupons, whether detached from the bonds or not, draw interest after their maturity: *City of Aurora v. West*, 7 Wall. 82; *Langston v. South Carolina R. R. Co.*, 2 S. C. 248; *City of San Antonio v. Lane*, 32 Tex. 405; *Town of Genoa v. Woodruff*, 92 U. S. 502; *Hollingsworth v. Detroit*, 3 McLean, 472, 473; *National Exchange Bank v. Hartford etc. R. R. Co.*, 8 R. I. 375; 91 Am. Dec. 237; *Commonwealth of Virginia v. Chesapeake and Ohio Canal Co.*, 32 Md. 501.

The following cases may be cited as holding a contrary doctrine: *Force v. City of Elizabeth*, 28 N. J. Eq. 403; *Columbia County v. King*, 13 Fla. 451; *Rose v. City of Bridgeport*, 17 Conn. 243.

In the following cases it is held that interest cannot be compounded, where the note provides that interest shall be payable annually, but that interest must be computed as simple interest: *Leonard v. Villars*, 23 Ill. 377; *Bannister v. Roberts*, 35 Me. 75; *Niles v. Board of Commissioners*, 8 Blackf. 158; *Hastings v. Wiswall*, 8 Mass. 455; *Doe v. Warren*, 7 Me. 48; *Stokely v. Thompson*, 34 Pa. St. 210; *Pindall v. Bank of Marietta*, 10 Leigh, 481.

While the following cases may be cited as holding the reverse, to wit, that interest will be allowed upon unpaid interest, where by the terms of the note interest is payable annually: *House v. Tennessee Female College*, 7 Heisk. 128; *Pierce v. Rowe*, 1 N. H. 179; *Preston v. Walker*, 26 Iowa, 205; 96 Am. Dec. 140; *Wheaton v. Pike*, 9 R. I. 132; 98 Am. Dec. 377; *Wright v. Eaves*, 10 Rich. Eq. 582; *Lewis v. Pashcal's Adm'r*, 37 Tex. 315; *Aspinwall v. Blake*, 25 Iowa, 319; *Singleton v. Lewis*, 2 Hill (S. C.), 408; *O'Neill v. Sims*, 1 Strob. 115; *Doig v. Barkley*, 3 Rich. 125; 45 Am. Dec. 762; *Bledsoe v. Nixon*, 69 N. C. 89; 12 Am. Rep. 642; *Talliaferro v. King*, 9 Dana, 331; 35 Am. Dec. 140.

In the following cases it is held that interest may be allowed on interest, if the promise to pay it is made after the interest matures, but not if the promise was made before the maturity of the interest: *Stewart v. Petree*, 55 N. Y. 621; 14 Am. Rep.

352; *Van Benschooten v. Lawson*, 6 Johns. Ch. 313; 10 Am. Dec. 333; *Thornhill v. Evans*, 2 Atk. 330; *State of Connecticut v. Jackson*, 1 Johns. Ch. 13; 7 Am. Dec. 471; *Waring v. Cunliffe*, 1 Ves. Sr. 99; *Chambers v. Goldwin*, 9 Id. 254; *Banks v. McClellan*, 24 Md. 62; 87 Am. Dec. 594; *Toll v. Hiller*, 11 Paige, 228; *Henry v. Flagg*, 13 Met. 65; *Forman v. Forman*, 17 How. Pr. 255; *Pindall v. Bank of Marietta*, 10 Leigh, 481; *Childers v. Deane*, 4 Rand. 406.

In Wisconsin and Missouri, and perhaps other states, interest is allowed upon unpaid interest, but this is in pursuance of an express statutory provision. By these decisions it is also held that a contract to pay interest upon interest which may thereafter accrue cannot be enforced, although it does not render the principal contract for the loan or forbearance usurious. It is held that such contract to pay the interest upon the interest does not, in fact, contaminate the original contract, but that its provisions are against public policy, and will not be enforced.

The authorities being thus conflicting, we look to the statute, for the purpose of ascertaining the intention of the legislature in enacting the interest laws of this state, and to aid us in their construction.

Section 1 of chapter 44 of the Compiled Statutes of 1887 provides: "Any rate of interest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods, or things in action; which rate of interest so agreed upon may be taken yearly, or for any shorter period, or in advance, if so expressly agreed."

By an analysis of this section, we find that the rate of interest to be agreed upon shall not exceed ten per cent, but that it may be taken yearly, or for any shorter period, or in advance. The amount of money represented by the principal note in this case is four thousand four hundred dollars. By the decision of the district court, plaintiff was allowed interest thereon at the rate of ten per cent. No more could have been allowed, without an infraction of the provisions of the section referred to. The interest is payable semi-annually; which is in accordance with law. It will therefore be seen that should interest be allowed upon the unpaid semi-annual installments of interest, more than ten per cent would be allowed thereby. Again, the statute provides that this interest may be taken for a shorter period than yearly. If it may be taken for

six months, it may be taken for one month, or any shorter time, and thereby the interest might be made to draw interest from soon after the date of the note, or in fact, the interest might be taken in advance, if so agreed. The first year's interest might thus be made a part of the principal, and permitted to draw interest from the date of the principal note, by simply representing it in a coupon, instead of upon the face of the note. An examination of this section of the statute convinces the writer that it was the purpose of the legislature to allow ten per cent per annum, and no more, but that the interest might be taken at the same rate for a shorter period, or in advance; but that it should not, in any event, exceed the "ten dollars per year upon one hundred dollars."

The decision of the district court will therefore be affirmed.

INTEREST UPON INTEREST, ALLOWANCE OF: *Mason v. Callender*, 2 Minn. 350; 72 Am. Dec. 102, note 116; *Anketel v. Converse*, 17 Ohio St. 11; 91 Am. Dec. 115, and note 121; *Young v. Hill*, 67 N. Y. 102; 23 Am. Rep. 99.

AGREEMENT FOR INTEREST UPON INTEREST does not increase the rate of interest on the principal sum, and is not therefore usurious: *Hale v. Hale*, 1 Cold. 233; 78 Am. Dec. 490, note 494; *Stewart v. Petree*, 55 N. H. 621; 14 Am. Rep. 352.

INTEREST UPON INTEREST, ADDED AS PRINCIPAL IN RENEWAL NOTE, when not usurious: *Gilmore v. Bissell*, 124 Ill. 488.

CONTRACT BY WHICH PARTY LENDS UNITED STATES BONDS, AND THE BORROWER AGREES TO PAY OVER to the owner the interest paid by the government thereon, and six per cent in addition, is not usurious: *Marshall v. Rice*, 85 Tenn. 502.

COQUILLARD v. HOVEY.

[23 NEBRASKA, 622.]

PLEADING AND PRACTICE. — IN AN ACTION ON GUARANTY CONTRACT, where the petition contains sufficient allegations of the purpose and intent of the parties in entering into the contract, it should not contain letters from the guarantor written before and after the execution of the guaranty. Such letters will be stricken out on motion, though admissible in evidence to show the circumstances under which the agreement was executed, as well as to aid in its construction.

CONTRACTS — CONSTRUCTION. — Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; but where its meaning is obscure, and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, under proper instructions.

GUARANTY. — IN ACTION ON GUARANTY CONTRACT for the payment of certain notes, it was pleaded in defense that such contract, by its terms, did not apply to such notes, and also that defendants were discharged

by want of diligence in the collection of the notes, which was shown by the evidence, and the court held that, though the verdict in favor of defendants might not be sustained by the evidence as to the construction of the guaranty contract, it could be sustained as to the discharge through negligence, and would not therefore be set aside.

George B. France and Ryan Brothers, for the plaintiff in error.

Lamb, Ricketts, and Wilson, and Webster and Stewart, for the defendants in error.

REESE, C. J. An action was instituted in the district court, in which plaintiff, in his petition, alleges that, on the twenty-third day of March, 1878, the defendants were partners under the firm name of Hovey and Traphagen, in Nebraska, and as such firm were engaged in selling agricultural implements, and that upon said date defendants executed, in writing, a guaranty of payment of all notes and evidences of indebtedness taken pursuant thereto by defendants as the agents of plaintiff. The sales were to be made and the notes taken in the course of the agency of defendants, to be then given by plaintiff to defendants upon the execution of said guaranty, and which guaranty was as follows:—

“Know all men by these presents, that we, F. A. and C. M. Hovey and W. J. Traphagen, of the city of Lincoln, in the state of Nebraska, guarantee to Alexis Coquillard, of the city of South Bend, in St. Joseph County, in the state of Indiana, payment of any and all notes, or other evidences of debt, received and taken by us for wagons sold by us for said Coquillard, as his agents, for the sale of the Coquillard farm and spring wagons.

“Witness our hands and seals this twenty-third day of March, 1878.

“HOVEY AND TRAPHAGEN,

“Agents for Alexis Coquillard.”

It was alleged that, upon the faith of the guaranty of the payment of all notes to be taken by defendants in the course of their business as agents of plaintiff in the sale of plaintiff's wagons, the defendants became the agents of plaintiff; that, previous to the execution of the contract of guaranty, and after the execution of the same, defendants wrote certain letters to plaintiff, which were set out in the petition, and which said letters, together with the contract referred to, were relied upon by plaintiff as fixing and defining the liability of defendants as such guarantors; that, relying upon the guaranty by

defendants of the payment of the notes taken by them, and to be thereafter taken, in the sale of wagons for him, plaintiff sent wagons to defendants, which were sold, and among others, the notes which are copied and attached to the petition were taken in payment therefor, and were returned by defendants to plaintiff, said notes being covered by the guaranty; that the notes are unpaid and worthless, and cannot be collected; that the notes provided that if their collection was enforced by law a reasonable amount should be allowed to holder as attorney's fees; that by reason of their non-payment it has become necessary to enforce the collection by law. It is alleged that there is due on said notes the amount of principal and interest thereon, less certain payments, together with attorney's fees, and judgment is demanded for the sum of \$750, and an attorney's fee amounting to ten per cent of the recovery.

Defendants appeared, and moved to strike out of plaintiff's petition the copies of letters incorporated therein. This motion was sustained, to which the plaintiff excepted, and the ruling thereon is now assigned for error.

In this ruling of the court there was no error. The letters consisted of a part of the correspondence between the parties to the action, both before and after the execution of the guaranty. While no doubt competent evidence, and admissible as such, for the purpose of showing the circumstances under which the agreement was executed, as well as to aid in its construction, yet the petition contained sufficient allegations of the purpose and intent of the parties in entering into the contract without the letters referred to. They were properly introduced and admitted in evidence, but unnecessarily encumbered the record as a part of the pleadings. They were no part of the instrument upon which the suit was founded, and could only aid in construing it.

Defendants filed separate answers. The answers of F. A. Hovey and C. M. Hovey were substantially the same. They consisted of the allegations that a part of the notes referred to in the petition of plaintiff were not taken by the firm of Hovey and Traphagen, but that they were renewals of notes taken by said defendants by plaintiff, by which their time of payment was extended, and which was done without the knowledge or consent of defendants, or any of them, and that the original notes matured more than five years before the commencement of this action, and that the claim thereon was barred by the statute of limitations; that at the time the notes mentioned in

plaintiff's petition became due and payable, the makers thereof were solvent and able to pay the same, and that collection could have been made by the ordinary methods, but that by reason of the negligence and entire want of diligence on the part of plaintiff, they were not collected, but were suffered to remain unpaid, and since maturity all of the makers have become insolvent; that no notice was ever given to defendants that plaintiff desired to hold them responsible for said notes upon the guaranty, until a short time before the commencement of the action, and after the makers had become insolvent. The allegations of the petition, excepting such as are modified by the answer, are denied.

The answer of Traphagen is substantially the same as those of the other defendants, with the additional averment that, prior to the commencement of the suit, the firm of Hovey and Traphagen had been dissolved, their copartnership ended, and all assets assigned to the Hoveys, who assumed and undertook to pay all indebtedness of the firm, and therefore the liability of Traphagen, if any existed (which was denied), was that of a surety only.

The trial was to a jury, and resulted in a verdict in favor of all the defendants.

One principal question presented to the trial court, and the only one with which we have to do, is as to the construction or interpretation of the contract of guaranty entered into by the parties, and which is made the basis of the action. It was contended by plaintiff that the guaranty could only be construed to be an undertaking entered into by them, guaranteeing all notes taken by them in the transaction of the plaintiff's business, not only before but after the execution of the contract. It was claimed by defendants that by the terms of the agreement their liability was limited to notes taken by them prior to its execution, and being without consideration, was therefore void, or at least that the notes referred to in the petition were taken after the contract was made, and not within its terms. The contract was made on the twenty-third day of March, 1878. The notes referred to were severally executed on the following dates, to wit: March 27, 1878, July 27, 1878, October 1, 1878, October 31, 1878, November 2, 1878, and February 22, 1879. It is contended by counsel for plaintiff that an agreement of the kind here referred to, assuming to guarantee the payment of notes which had been before that time taken, would be void, so far as such notes were con-

cerned, and there would be no liability created by the execution of such an instrument; and for that reason, under the rule that a contract should be supported rather than defeated by construction, the contract here ought to receive such an interpretation as would make it effective. We need not stop here to inquire whether such a contract given under such circumstances, whereby the party agreed to guarantee the payment of debts which were then in existence would be binding or not, as that question is not before us.

It is insisted that the court should have construed the contract instead of submitting the question to the jury, as was done by the court. As we understand the rule for the construction of contracts, it is, that if a contract is to be construed by reference to its terms alone, and without calling in the aid of extrinsic facts and circumstances, it is the duty of the court to interpret it. But if the construction must depend upon proof of other and extrinsic facts, then these questions of fact should be submitted to the jury, under proper instructions from the court: *Begg v. Forbes*, 30 Eng. L. & Eq. 508; *Etting v. Bank of United States*, 11 Wheat. 74; *First Nat. Bank v. Dana*, 79 N. Y. 108; *Edelman v. Yeakel*, 27 Pa. St. 26.

This agreement was, that defendants guaranteed the payment of any and all notes or other evidences of debt received and taken by them for wagons sold by them for the plaintiff, as his agent. The language used, when taken alone, would strongly indicate the purpose on the part of the guarantors to guarantee the payment of such notes as were then in existence, for wagons sold by them for plaintiff, and which had been received by him. **There is nothing in the language of the contract which would lead to any other conclusion.** No reference is made to a continuation of the business, or to the fact that notes would probably be taken by defendants as the agents of plaintiff at a future day. But yet we think that this contract, like all others, should be construed with reference to the circumstances under which it was made. By the correspondence between the parties, it is intimated, although not definitely stated, that a contract was then in existence which bound defendants to guarantee the notes by indorsement. On the second day of March, 1878, and about twenty days before the execution of the guarantee, defendants wrote plaintiff, requesting him to send them a written agreement which would require them to guarantee the collection of the notes, that they might sign it and return it to him, as they

did not desire to place their guaranty upon each note; the reason assigned being that they did not want the notes to pass through the local banks with their indorsement thereon, as it would naturally affect their credit, which they were anxious to sustain. It is shown by the testimony of defendants that they continued in the employ of plaintiff during the years 1878, 1879, 1880, and 1881. It might be argued that the request in the letter written prior to the execution of the guaranty would tend strongly to prove that the guaranty which was furnished in accordance with the request of that letter was intended for notes taken by them in the future, and if so, the contract would be binding. These questions, it seems to us, were very properly left to the jury.

Were this the only defense presented in the case, we would very strongly incline to the opinion that the verdict was not sustained by the testimony, for the reason that we are unable to find any testimony introduced on the part of the defendants, or any fact on the part of either party, which could by any reasonable interpretation be held to sustain the contention of defendants that the guaranty was only intended for antecedent transactions.

Almost, if not quite, all the evidence introduced by defendants was under the allegations of their answers that the makers of the notes were solvent and responsible at the time the notes were made, and that through the carelessness and negligence of plaintiff, they had been permitted to leave the county or become insolvent, without payment, and that, in fact, the debts were lost alone through the want of diligence on his part. With reference to some of the notes, there was testimony introduced tending to prove that the securities taken at the time of their execution and delivery to plaintiff were not accounted for by him, and for which no account was given upon the trial; and further, that no notice was ever given to defendants that the notes were not paid, until a very short time prior to the commencement of this action, and that during all this time the notes were in the possession of plaintiff.

Instructions Nos. 3 and 4, asked by plaintiff, were given. They are as follows:—

“No. 3. If you find that, by the terms of the guaranty, defendants are liable to account for the amount of the notes in respect to which the guaranty was made, the defendants must show that they were discharged by some act or negligence of defendants” (plaintiff?).

"No. 4. The defendants allege their discharge by reason of the negligence of plaintiff in not pursuing his remedy against the makers of the respective notes. Under the pleadings, the defendants must show, as to such notes as they seek to be released, that the maker thereof was solvent when the note came due, and afterwards became insolvent."

By these instructions, the question of the negligence of plaintiff was submitted to the jury, and it is quite possible that the jury returned their verdict upon the consideration of that branch of the case alone. It is not our province to discuss the question of the correctness of the law given by these instructions. It must be sufficient to say that they were given (and probably correctly), and it was the duty of the jury to follow them in the examination of the case. The judgment of the district court is affirmed.

CONSTRUCTION OF CONTRACT, WHEN QUESTION FOR THE JURY: 54 Me. 372; 92 Am. Dec. 551.

WHERE TERMS OF WRITTEN INSTRUMENT ARE AMBIGUOUS, its meaning should be left to the jury: *Illges v. Dexter*, 77 Ga. 36.

KNORR v. PEERLESS REAPER COMPANY.

[23 NEBRASKA, 636.]

RES ADJUDICATA. —WHERE IN ACTION UPON TWO OF THREE NOTES given for the purchase price of a reaper, it is shown that in an action upon the other note between the same parties, defendant alleged a breach of warranty in the sale of the machine, damages therefor, and that two other negotiable notes had been executed and delivered to plaintiff, whereupon defendant had judgment for damages for the amount of the purchase price of the machine, such judgment is not a bar to the present action founded upon the notes mentioned in the answer to the former action, but it is a bar to the defense therein as to the breach of warranty in the sale of the machine pleaded and recovered on in the former action.

Sedgwick and Power, for the plaintiff in error.

France and Harlan, for the defendant in error.

REESE, C. J. The original action in this case was founded upon two promissory notes, executed by plaintiff in error to defendant in error, dated July 5, 1880, one for forty-five dollars, due on the first day of November, 1882, and one for fifty dollars, due on the first day of November, 1883, each bearing interest at ten per cent.

The answer admitted the execution and delivery of the

notes declared upon, and alleged as a defense thereto that said notes were given as a part of the purchase price of a reaper and mower, sold by defendant in error to plaintiff in error for \$145, for which three promissory notes were given, two of which were the notes described in the petition. It is alleged that, at the time of the purchase of the reaper, defendant in error warranted the same to be a good machine, constructed of good material, well adapted to the use for which it was designed, and that it would perform good work as such reaper and mower; the plaintiff in error relied upon these representations and warranty in making the purchase, but that the machine failed to perform as warranted, and was, in fact, worthless; that afterwards a new contract was made between plaintiff and defendant, by which it was agreed that defendant in error should repair the machine, replacing the defective parts, and substituting good material therefor,—in short, make the machine fully comply with the terms of the original warranty; that in case it failed, the damages which had been sustained by plaintiff in error, amounting to one hundred dollars, as claimed by him, should be paid, together with all damages sustained under the second agreement, and ten dollars advanced for freight; that the notes should be returned to him, and the machine returned to defendant in error; that upon the second trial, the machine proved to be worthless, of which defendant in error had notice, and plaintiff in error offered to return the same to defendant in error, and demanded the return of his notes. It is further alleged that the consideration for the notes had wholly failed, wherefore plaintiff in error demanded judgment for costs.

Defendant in error, for reply to the answer of plaintiff in error, alleged that, on the fifteenth day of April, 1885, during the April term of the district court, in an action then pending therein between plaintiff and defendant, which was instituted upon the other note referred to as having been given for the machine, plaintiff in error set up as a defense to that action the same cause of defense as that set forth in his answer in this case, which answer in the previous case was copied into and made a part of the reply. That answer need not be here set out in full. It must be sufficient to say that, in all essential respects, it was substantially the same as the answer in this case, with the exception that affirmative relief was demanded upon the alleged cause of action in favor of plaintiff in error, growing out of the damages sustained by him by

reason of the failure of the machine to perform as warranted. The prayer of the petition was for judgment against defendant in error for the sum of \$405. The verdict in that case was in favor of plaintiff in error, and the amount of damages found by the jury in his favor was \$209.55; but upon motion for a new trial, the verdict was found to be excessive, and plaintiff was required to remit therefrom \$64.55, leaving the verdict to stand, in favor of plaintiff in error, for \$145. The *remittitur* was filed, and the plaintiff in error recovered a judgment for \$145, together with the costs of the suit. The judgment in that case was pleaded by defendant in error as a bar to the defense set up by the answer.

Upon a trial in this case, the pleadings and judgment in the former case were put in evidence. It was admitted that the former case was between the same parties to the record as in this case; that the notes described in plaintiff's petition were given in the same transaction as the note described in the former case, and for the same machine. It is also shown that, at the time of the trial in the former case, defendant in error had the notes in its possession, and which fact was then established by proof. After the close of the testimony, the court instructed the jury to return a verdict in favor of defendant in error for the amount of the principal and interest of the notes described in the petition. A motion for a new trial was filed by plaintiff in error, which was overruled, and a judgment rendered in favor of defendant in error upon the verdict returned in obedience to the instructions of the court. Plaintiff in error brings the cause to this court by proceedings in error.

The only question presented by the record is as to the effect of the adjudication in the former suit. Each party seems to insist that the result of that trial must be taken as final, in his behalf. We think it quite probable, under the authorities cited, that had the sole question presented in the other case been that of the failure of the consideration of the note, it might have been treated in this case as an adjudication in favor of plaintiff in error, upon the merits of this case. But upon an examination of the answer presented in that case, we find, not only the allegations contained in the answer in this case, but also a prayer for affirmative relief, which was granted. The amount of damages awarded by the court was equal to the purchase price of the machine. In that answer, we find the following allegation: "The defendant says that

two of said notes, to wit, one for forty-five dollars and one for fifty dollars, with interest on both notes from July 5, 1880, are negotiable notes, and are now outstanding, and that plaintiff has either sold the said notes and received the proceeds thereof, or the said plaintiff now holds the said notes against this defendant." The action being upon a note for fifty dollars, it was, of course, canceled by that suit. If the verdict of the jury, to the extent of the amount for which judgment was allowed, was founded upon the matter of damages alone, by the breach of warranty, the judgment, added to the amount of the note and its interest, would be a finding in favor of plaintiff in error to the extent of over \$200, as he received an affirmative judgment for \$145. But, in any event, the actual recovery in favor of plaintiff in error was the \$145. While it is true that the testimony in that case is not all certified to this court in the case at bar, yet it can hardly be supposed that, under the rule stated in *Aultman v. Stout*, 15 Neb. 586, this amount of damages could have been allowed, without taking into consideration the fact that these notes were outstanding, and were to be paid by plaintiff in error. The defenses in both cases were not simply a failure of consideration, but they were based upon a breach of warranty in the sale of the reaper. Had plaintiff in error brought an independent action for damages growing out of the breach of warranty in the sale of the reaper, and recovered his damages, which he might have done, we think it could not be doubted that such action would bar his right to plead such breach of warranty in this case: *McDonald v. Gregory*, 41 Iowa, 513. A careful examination of the answer filed in the suit upon the first note to mature, it seems to us, can result in no other conclusion than that it was a count for damages, by reason of a breach of warranty, which incidentally presented the defense of failure of consideration. The contract out of which the indebtedness arose was one and indivisible. It was entered into at one time, between the plaintiff on the one hand and defendant on the other, and upon one consideration. Plaintiff in error's right of action upon it was also indivisible. He could not maintain a cross-action in the former case for his damages by reason of the breach of warranty, plead the execution of the other notes and his indebtedness thereon, recover damages to the full amount of his whole indebtedness upon the theory that the notes outstanding were negotiable and would have to be paid, and again, in this action, maintain the same de-

fense. In this particular, his rights were adjudicated by the former action: *Geiser Threshing Machine Co. v. Farmer*, 27 Minn. 428.

We think the instruction to the jury was correct, and the judgment of the district court will therefore be affirmed.

FORMER JUDGMENT IS RES JUDICATA, AS TO WHAT MATTERS: *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436, and note 444.

VILLAGE OF PONCA *v.* CRAWFORD.

[23 NEBRASKA, 662.]

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—CONTRIBUTORY NEGLIGENCE.—Whether a stranger exercising ordinary care and prudence in passing along the sidewalk of an incorporated village after dark should have turned back and abandoned his purpose upon ascertaining that there was an apparent break in the sidewalk, in falling from which he received injury, or should have continued in his endeavor to proceed, is a question for the jury, under proper instructions, and when the latter are given, the verdict will not be disturbed.

MUNICIPAL CORPORATION.—SIDEWALK TO BE SAFE need not be wide, very permanently built, of costly material, nor continuous throughout the length of the street; but when built or suffered to remain on a part of the street, its ends or termini must be so graduated to the natural level of the street as to permit pedestrians to safely pass from it without being obliged to climb down over obstructions.

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—NOTICE.—Sidewalks in incorporated villages are usually built by abutting property owners under ordinances or by-laws, and not from the city's finances. Therefore no amount of knowledge on the part of the plaintiff of the low state of the finances of the village is sufficient to charge him with legal notice of a defect in the sidewalk by reason of which he sustained the injury complained of.

MUNICIPAL CORPORATIONS—NOTICE OF DEFECT IN SIDEWALK.—After a sidewalk has been placed in position, no matter by whom or by what authority, and the city authorities have notice of a defect therein, or it has been built so long that knowledge is presumed, the city is as liable as though the sidewalk had been built by its express authority.

VERDICT ARRIVED AT BY EACH JUROR MARKING A SUM AS DAMAGES, the total of which constitutes a dividend, taking their own number as a divisor, and the quotient as their verdict, without prior agreement to be bound by it, will not be disturbed.

EVIDENCE.—RULE AS TO PROOF OF WRITTEN INSTRUMENTS and records does not include oral testimony of the existence of such instruments or records, preliminary to their introduction or proof of loss.

ORDER OF ADMITTING EVIDENCE IS DISCRETIONARY with the court.

PLEADING AND PRACTICE.—ERROR WITHOUT PREJUDICE will not reverse the judgment.

THE plaintiff, Crawford, an entire stranger in the village above named, was passing along a sidewalk on one of the streets thereof on an extremely dark night. The sidewalk suddenly terminated at a height of about three feet from the ground, without any steps or convenient means of getting on or off the sidewalk. Crawford discovered the termination of the walk in front of him, but, supposing that a method of descent had been provided, placed one foot on the walk, and with the other reached down, feeling for the step or means of descent. He lost his balance and fell, striking a saw-bench and other obstructions, causing the injury complained of. The other facts are stated in the opinion of the case here reported.

W. E. Gantt, for the plaintiff in error.

L. S. Fawcett and A. E. Barnes, for the defendant in error.

COBB, J. The cause was before this court on the record of a former trial in the district court of Dixon County, when the judgment was reversed and the cause remanded for further proceedings, in case reported in 18 Neb. 551.

From the record now before us, it appears that, upon the cause again coming up in the district court, the defendant, on leave, filed an amended answer. The plaintiff's cause of action, as set out in his petition, being for personal injuries suffered within the corporate limits of the defendant village of Ponca, by the plaintiff falling off the end of an elevated sidewalk, over and upon certain obstructions there being, etc. The defendant, by its amended answer, denied that at the time of the happening of the accident to the plaintiff, as set out in his amended petition, to wit, on April 8, 1879, or at any time previous thereto, said defendant was a corporation. Defendant also alleged that the sidewalk upon which plaintiff claimed to have sustained injuries was built by one Samuel Gamble, who then and now owns the lot along which the same was constructed, and who built the same without authority from the defendant; and that the defendant never authorized said sidewalk to be built; that the defendant never in any manner exercised authority or jurisdiction over said sidewalk; that it never made, or had made, any repairs upon the same; that said sidewalk never was in line with, nor in any manner connected with, any sidewalk over which defendant at any time, or in any manner, exercised jurisdiction or control,—concluding with a general denial.

There was a new trial to a jury, which found for the plaintiff in the sum of \$950. Defendant's motion for a third trial being overruled, plaintiff had judgment, and defendant again brings the cause to this court on error, assigning the following errors: 1. That the verdict is not sustained by sufficient evidence; 2. That the verdict is contrary to law; 3. For error of law occurring at the trial, duly excepted to; 4. The damages are excessive, appearing to have been given under the influence of passion or prejudice; 5. For misconduct of the jury in this, to wit, that the verdict was arrived at by the jury, by each member marking a certain sum or amount, and then adding all of the twelve amounts together, and dividing the aggregate sum thereof by twelve, and thus arriving at the sum of \$950, which said sum they adopted as their verdict, all of which is more fully set out and substantiated by the affidavit and exhibit hereto attached; 6. The court erred in refusing to give the sixth and seventh instructions asked for by defendant; 7. The court erred in giving instructions numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, asked for by plaintiff; 8. The court erred in giving instructions numbers 1 and 3, on its own motion; 9. There were irregularities in the proceedings, in this, that said jury arrived at its verdict by adding twelve several amounts each, one given by each juror, and dividing the aggregate amount therefor, to wit, \$11,400, by twelve, and thus getting the sum of \$950, which said last sum the said jury adopted, and presented to the court as its verdict.

The first, second, and fourth assignments will be considered together. Under this head, counsel for plaintiff in error, in their brief, insist that the facts, as stated by the plaintiff in his testimony at the trial, disclose contributory negligence on his part which should prevent his recovery. The act of the plaintiff, suggested as constituting contributory negligence, is that of not turning back and abandoning his walk along the sidewalk and street when he discovered that the sidewalk did not continue on the same unbroken level. Whether a person of ordinary care and prudence, of the knowledge of and acquaintance with the streets and sidewalks of a village, or the want of either, which the plaintiff was shown to have possessed, would have turned back and abandoned his purpose in proceeding along the street on ascertaining that there was an apparent break in the sidewalk, or would have continued his endeavor to proceed, is a question of fact for the jury, proper for their consideration and determination, under proper

instructions. Such instructions were given, and I think their conclusion is fully justified by the evidence. Attention is called to the consideration of the condition of the finances of the defendant, in common with other villages in the early stage of their corporate existence, rendering a complete system of sidewalks impracticable. To this it must be replied, that, to be passable and safe, a sidewalk need not be wide, very permanently built, nor of costly material. Neither need it be continuous throughout the length of the street; but when one is built, or suffered to remain on a part of the street only, its ends or termini must be so graduated to the natural level of the street as to permit pedestrians to safely pass from it, and without being obliged to climb down over obstructions. Furthermore, sidewalks in villages are not, ordinarily, built from the public finances, but by the abutting property holders, in obedience to appropriate ordinance and by-laws. It must be conceded, then, that no amount of knowledge on the part of the plaintiff of the low state of finances of the defendant, or of villages generally, would be sufficient to charge him with legal notice of the defect in defendant's sidewalk, by reason of which he sustained the injury complained of. The evidence seems to leave no doubt that the sidewalk in question was built on the side of and projecting into the street from the line of an abutting lot, the position in which public sidewalks are placed, if at all. When this walk had been placed in that position, by whomsoever, or by whatever authority, and the village authorities had notice of it, or it had been built so long in that position that such authority ought to be presumed to have knowledge of it, the village would be equally liable as though the walk had been built by its express authority. Having carefully examined the evidence as to the nature and extent of the plaintiff's injuries, I fail to see that the damages allowed by the verdict are excessive or unjust.

As to the point raised by the first denial in the answer of defendant, its corporate existence at the date of the negligence complained of, the corporate existence *de facto* of the village of Ponca, at least since the year 1876, was sufficiently proved to sustain the verdict; such being the case, the erroneous admission of evidence tending to prove the regular incorporation of the village, even if such there was, would be error without prejudice.

As to the third assignment, it is sufficient to say that no

error of law occurring at the trial is pointed out in the brief for our consideration.

The fifth and ninth assignments are to be considered together,—that for the misconduct and irregularities of the jurors in retirement, in marking down the damages respectively as a dividend, taking their own number as a divisor, and returning the quotient as their verdict, they acted improperly, and that a new trial ought to be granted, is to be considered in the sole light of the evidence of the jurors Miller, Paul, and Bottorff, who disclosed the fact. On examination, they testified “that no agreement was made, prior to marking down the respective amounts, that the result should be their decision and constitute their verdict, but that several votes were afterwards taken, and that the marking down was not binding.”

It has been held, with a large concurrence of opinion, that a showing that a verdict thus ascertained, without previous agreement to be bound by the result, is not alone sufficient to invalidate the finding: *Barton v. Holmes*, 16 Iowa, 252; and that if the specified means is adopted merely for the sake of arriving at a reasonable measure of damages, without binding the jurors by the result, it is no objection to the verdict: *Dana v. Tucker*, 4 Johns. 487.

In a like instance, in the case of *Harvey v. Jones*, 3 Humph. 157, it was held that a jury may make the experiment with a view to ascertain what the amount will be, and if the amount gives satisfaction, they may retain it as their verdict. But they cannot agree, before the amount is ascertained, that they will abide by it, and if they do, it is an error for which a new trial will be granted.

In the case of *Dunn v. Hall*, 8 Blackf. 32, the court say that “the law is well settled that in actions for unliquidated damages the jury may adopt the process resorted to in this case, adding the amounts and dividing by twelve, to obtain a medium sum to be submitted as a proposition for a verdict; and it is equally well settled that it must not be adopted pursuant to an agreement to be bound by its result.” The impropriety of this practice of addition, division, and the quotient, as a measure of damages, consists, not in the method nor the sum of the result, but in the prior agreement to be bound by it; and for the reason that this verdict is within the rule of propriety, and not obnoxious to it, the fifth and ninth assignments are overruled.

As to the sixth, seventh, and eighth assignments of errors of the court in refusing the sixth and seventh instructions offered by defendant, in giving the eleven instructions offered by plaintiff, and the first and third of its own motion, it is sufficient to state that in the former review of this case it was held that the rule as to proof of written instruments and records does not include oral testimony of the existence of such instruments and records, preliminary to their introduction or proof of loss; that the order of admitting evidence was discretionary with the court, and that an error on the trial without prejudice or disadvantage to the plaintiff in error was not one of sufficient gravity to reverse the judgment. These views are repeated; they dispose of the remnants of the case.

The judgment of the district court is affirmed.

LIABILITY OF CITY FOR INJURIES RECEIVED through a defective sidewalk: *Hubbard v. City of Concord*, 35 N. H. 52; 69 Am. Dec. 520, and note thereto; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27; 46 Am. Rep. 122; *City of Denver v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594, note 598; and see generally, as to defective streets, *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453, and note; *Clark v. City of Richmond*, 83 Va. 355; 5 Am. St. Rep. 281, and note; *Liffin v. Inhabitants of Beverly*, 145 Mass. 549; *McVoy v. Mayor etc.*, 85 Tenn. 19; *Village of Mansfield v. Moore*, 124 Ill. 133; *Town of Gosport v. Evans*, 112 Ind. 133; *Brennan v. St. Louis*, 92 Mo. 482; *Treise v. St. Paul*, 36 Minn. 526; *Tabor v. St. Paul*, 36 Id. 188.

VERDICT WILL BE ALLOWED to stand where the jury agree each to specify a sum as due to the plaintiff, and divide the aggregate by twelve, and take the quotient as the result, when the jurors have not previously stipulated to be bound by such verdict: *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78, and note 80; *contra*, when they have so agreed: *Sawyer v. Hannibal etc. R. R. Co.*, 37 Mo. 240; 90 Am. Dec. 382, and note 390; *Goodman v. Cody*, 1 Wash. 329; 34 Am. Rep. 808.

DISCRETION OF COURT AS TO ORDER OF PROOF: *Runyan v. Price*, 9 Minn. 194; 86 Am. Dec. 93.

COURT CANNOT DICTATE ORDER IN WHICH PARTY SHALL PUT IN HIS EVIDENCE as to a question of fact: *Lewis v. Schwenn*, 93 Mo. 26; 3 Am. St. Rep. 511.

WIGGENHORN v. KOUNTZ.

[23 NEBRASKA, 690.]

WATERCOURSES — ACRETION TO ISLAND BY AVULSION. — The owner of an island in a river becomes the owner of an accretion formed on such island by an avulsion attached to the lower end of such island from the sudden washing away of the upper end thereof, and may maintain trespass against a stranger for the injury done in cutting timber on the land thus formed.

WATERCOURSES. — WHERE MAINLAND AND ISLAND in a non-navigable river have been separately surveyed, and sold to different parties, the grantees of the mainland do not by their grant acquire the island; they, at most, can claim only to the center or thread of the stream between the shore and the island.

WATERCOURSES. — WHERE GRANT OF MAIN LAND AND ISLAND in a non-navigable river are separate and distinct neither grantee can claim beyond the calls of his entry or patent, the rule being that where there is a clear reservation of islands in a grant of mainland adjacent to a river, either expressly or by necessary implication, such islands do not pass to the grantee, and the *filum aquæ* which bounds the grant is the center thread of the stream between the shore and the island. In such case, two *filæ aquæ* are established, one on each side of the island.

T. B. Wilson, J. B. Strobe, and Sam M. Chapman, for the plaintiff in error.

C. Thompson, for the defendant in error.

MAXWELL, J. The defendant in error brought an action against the plaintiffs, in the district court of Saunders County, to recover the value of certain trees cut down by and converted to the use of the plaintiffs in error. The defendant in error alleges, in his petition, "that from the seventh day of December, 1871, until the twenty-ninth day of November, 1882, he was the owner in fee-simple and in the possession of lot 1 in section 30, in township 13 north, of range 10 east, in Saunders County; that on or about the first day of September, 1881, and between that date and said twenty-ninth day of November, 1882, and while plaintiff was the owner and in possession of lot 1 aforesaid, the said defendants, Ernest A. Wiggenhorn, John Johnson, and Emery A. Clossen, unlawfully and with force broke and entered upon the plaintiff's said land, described as follows, to wit: Lot 1, in section 30, in township 13 north, of range 10 east, of the sixth principal meridian, Saunders County, the state of Nebraska, and then and there cut down one hundred cottonwood trees belonging to plaintiff, and then growing on said land, and of the value of \$190, and carried the same away and converted them to their own use, to the plaintiff's damages in the sum of \$190."

Johnson filed an answer to the petition, in which he alleges, in substance, that he was employed by Wiggenhorn to cut the trees in question, and that Wiggenhorn informed him that he had lawful authority to cut said trees.

Wiggenhorn and Clossen answer jointly, denying the facts stated in the petition.

On the trial of the cause, a verdict in favor of Kountz, and against all the plaintiffs in error, for the sum of twenty-five dollars, was returned. A motion for a new trial was thereupon filed and overruled, and judgment entered upon the verdict.

The testimony shows that, at the time stated in the petition, the defendant in error was the owner of lot 1, section 30, township 13 north, range 10 east. The land was entered prior to the year 1860, and a patent issued in that year, under which the defendant in error claims title. The lot in question is an island situated in the Platte River, there being a well-defined channel on each side of said island. In the year 1867, during high water in the Platte River, the upper part of said island was washed away, and the testimony tends to show formed an accretion to the lower end of said island. The timber in question was cut on the land thus formed at the lower end of the island. That sixty trees from eight to fifteen inches in diameter were cut on this land, and used as piles on Mr. Wiggenhorn's mill-dam, is proved beyond controversy. There is some dispute in the testimony as to whether Mr. Johnson was hired by Wiggenhorn, or sold him the piles; also whether Clossen was employed by Wiggenhorn or Johnson; but in the situation of the case the particulars as to the transaction are not material. All three participated in the trespass, and Mr. Wiggenhorn procured the trees, for which he claims to have paid Johnson thirty-two dollars. The proof shows that the trees, for the purposes for which they were used, were worth from \$2 to \$2.75 each.

The principal defense relied upon is, that the land on which the trees grew was not the property of Kountz, but was public land, to which all had equal rights; and it is claimed further that the land thus suddenly formed would belong to the parties owning the mainland bordering on the river near said island. These questions will be considered in their order.

In *Lammers v. Nissen*, 4 Neb. 245, Judge Gantt, in defining the word "accretion," says "that an accretion to land is the imperceptible increase thereto on the bank of the river by alluvial formations, occasioned by the washing up of sand or earth,

or by direliction, as when the river shrinks back below the usual water-mark; and when it is by addition, it should be so gradual that no one can judge how much is added each moment of time. And when the formation of land is thus imperceptibly made on the shore of a stream, by the force of the water, it belongs to the owner of the land immediately behind it, in accordance with the maxim, *De minimis non curat lex*. It is said that no other rule can be applied on just principles, for the reason that every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way, he cannot be held accountable for his gain."

In speaking of an avulsion, Washburn on Real Property, 4th ed., volume 3, page 60, says: "Cases sometimes occur where considerable quantities of soil are, by the sudden action of water, taken from the land of one and deposited upon or annexed to the land of another. The difference between avulsion, as the latter process is called, and alluvion, consists in the one being done by imperceptible loss from the land of one, and increment to that of the other, and in the other, its being done suddenly, to an extent which can be ascertained and measured. In the case of avulsion, the soil still belongs to the first owner, unless he shall have suffered it to remain in its new position until it cements and coalesces with the soil of the second owner; in which case the property in the soil will be changed, and no right to reclaim it remain."

If it be conceded, therefore, that the land so formed at the lower end of the island in question was formed suddenly, by washing the soil from the upper end of the island to the lower, the soil would still remain that of the owner of the island, and a person cutting trees on the land so formed would be liable for the same.

The plaintiffs in error strenuously contend, in substance, that as a grant of land on a stream not navigable includes all islands or parts of islands between the shore and the center thread of the stream, that therefore the land on which the trees grew belonged to the owner of the mainland on the river adjacent to such islands.

There is no doubt of the rule that grants of land bounded upon a river not navigable carry with them the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, the rule of the com-

mon law being that proprietors of land adjoining public rivers not affected by the flow of the tide own the soil *ad filum aquæ*: 3 Kent's Com. 427.

In *Ingraham v. Wilkinson*, 4 Pick. 273, 16 Am. Dec. 342, the supreme court of Massachusetts say: "The doctrine of alluvion and its consequences seems to be very clearly settled. That which is formed by gradual accretion belongs to the owner of the soil to which it adheres. The land which may be separated from a man's farm by a sudden change of the bed of the river may be reclaimed by him who lost it. Islands formed in the river, if altogether on one side of the dividing line, the *filum aquæ*, belong to him who owns the bank on that side; if formed in the middle of the river, they are appropriated to the owners on each side, not in common, but in severalty, according to their original dividing line, the *filum aquæ*, as it is where the waters begin to divide. Such is the civil law, and the justice of this appropriation cannot be questioned. 'If the *filum aquæ* divides itself, and one part take the east and the other the west, and leave an island in the middle between both *fila*, the one half will belong to the one lord and the other to the other.'"

In *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. 548, 549, it is said: "In the case just now supposed, of an island arising in the middle of the river, it is divided by that line which was the thread of the river immediately before the rise of the island. But that line must thenceforth cease to be the thread of the river, or *filum aquæ*, because the space it occupied has ceased to be covered with water. But, by the fact of an island being formed in the middle of the river, two streams are necessarily formed by the original river dividing it into two branches; the island itself, having become solid land, forms itself a bank of the new stream on the one side, and the old bank on the main shore forms the other. And the same rule applies on the other side of the island. There must, then, be a *filum aquæ* to each of these streams, whilst the old *filum aquæ* is obliterated to the extent to which land has taken the place of water. But this island, having all the characteristics of land, may soon be divided and subdivided by conveyances and descents, and all the modes of transmission of property known to the law, and thus become the property of different owners. Now, suppose another island is formed in one of these branches, between the first island and the original main shore: it seems to us that it must be

divided upon the same principle as the first; but in doing it, it will be necessary to assume as the *filum aquæ* the middle line between the first island and the original river bank on that side."

Where the mainland and an island have been separately surveyed and sold by the government to different parties, the grantees of the mainland do not by such grant acquire the island. In such case, the grant to each being separate and distinct, neither can claim beyond the calls of his entry and patent. The rule is, that where there is a clear reservation of islands in a grant of mainland adjacent to a river, either expressly or by necessary implication, such islands do not pass to the grantee, and the *filum aquæ* which bounds the grant is the center thread between the shore and the island. In such cases, two *fila aquæ* are established, one on each side of the island: *Stolp v. Hoyt*, 44 Ill. 223; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. 544; *People v. Canal Appraisers*, 13 Wend. 355; *Buse v. Russell*, 86 Mo. 209.

In the case under consideration, it is clearly shown that there is a well-defined channel of the river on each side, between the mainland and the island. The grant of the mainland therefore would, at the most, merely extend to the center thread of the stream between the shore and the island, so that in no event could an owner of the mainland claim an interest in the island.

Some objection is made that the evidence is not sufficient to justify a verdict against Clossen. There is but little doubt that Mr. Wiggenhorn was the party really benefited by the cutting of the trees, and apparently he should be liable for the damages resulting therefrom. This question, however, cannot be determined in this action, as the motion for a new trial is joint. There is no error in the record, and the judgment is affirmed.

ISLANDS SITUATED IN WATERCOURSES, TITLE TO, AND RIGHTS OF OWNERS: *McCullough v. Wall*, 4 Rich. 68; 53 Am. Dec. 715, and note 727; note to *Hagan v. Campbell*, 33 Id. 281; *Stover v. Jack*, 60 Pa. St. 339; 100 Am. Dec. 566; *Welles v. Bailey*, 55 Conn. 292; 3 Am. St. Rep. 48

WINKLER v. ROEDER.

[23 NEBRASKA, 706.]

PLEADING AND PRACTICE—TRANSCRIPT ON APPEAL.—IMMATERIAL MATTERS, as copy of summons, and the return thereof, or other pleadings or matter not relied upon and not objected to, should not be included in the transcript, and where unnecessary matters are inserted therein, the costs of the same will be taxed to the party at fault, if the proper motion is made.

PLEADING AND PRACTICE.—WHERE ANSWER IS A GENERAL DENIAL, and the only issue is the truth of the allegations of the petition, an offer by defendant to introduce affirmative proof on cross-examination is properly refused.

DAMAGES — ATTORNEY'S FEES AS ELEMENT OF DAMAGES.—In Nebraska, vindictive or exemplary damages are not allowed. Therefore, attorneys' fees as an element of damages in an action in tort cannot be recovered.

Dilworth, Smith, and Dilworth, for the plaintiffs in error.

A. H. Bowen and J. B. Cessna, for the defendant in error.

MAXWELL, J. The defendant in error brought an action in the district court of Adams County against the plaintiffs, and alleges in his petition "that on the ninth day of November, 1883, in the night-time, between the hours of ten and eleven o'clock of said night, the said defendants broke into the dwelling-house of said plaintiff, and then and there made an assault upon the plaintiff, and did then and there him, the said plaintiff, beat, wound, whip, choke, and ill treat, by striking said plaintiff on the head and face with a large stick of wood, and by whipping said plaintiff with a carriage whip, on the body of said plaintiff, and by choking him, and by smearing the naked body of plaintiff with tar, whereby plaintiff was bruised, wounded, and made sick, whereby he was unable to attend to business for a period of one year, and that by reason of said assault, beating, wounding, and ill treatment as aforesaid, said plaintiff has sustained permanent injury by being permanently disabled from performing the usual labor of said plaintiff, and plaintiff alleges that he has sustained damages, by reason of said assault, beating, wounding, ill treatment, in the sum of five thousand dollars, for which he prays judgment, with reasonable attorneys' fees."

The plaintiffs in error (defendants below) filed an answer, denying all the facts stated in the petition. On the trial of the cause, the jury returned a verdict as follows:—

"We, the jury in this case, being duly impaneled and sworn, do find and say that we find for the plaintiff, and assess the

amount the said plaintiff is entitled to receive of and from said defendants, Henry Winkler, Oscar Winkler, John Blevensicht, and Frederick Young, at one thousand dollars, and two hundred dollars attorneys' fees."

A motion for a new trial was duly made and overruled, and judgment entered on the verdict.

Before proceeding to the consideration of the issues involved in this case, we desire to call attention to the condition of the record. The action was commenced in November, 1884, and the trial had in June, 1887, a number of terms of the district court having intervened between the commencement of the action and the time of trial. No objection is made to the summons, nor could there be, as the plaintiffs in error made a general appearance by filing an answer, yet we have a copy of the summons set out in the transcript, and the several returns of the officer thereon. Neither was any objection made to the several continuances of the case in the district court, but they are set out at length in the record. This matter covers eleven pages, and is entirely needless, and should be taxed to the party at fault. In a number of cases this court has held that immaterial matter, like a copy of a summons, the returns on the same, when no objection is made to the returns or the summons, should be omitted from the transcript. So, with a motion, demurrer, or other pleading not relied upon; they should be omitted, as they merely cumber the record. If objection should be made in this court to the omission of any pleading from the transcript, and the proper suggestion filed, the clerk of the district court will be required to certify the pleading omitted. But where unnecessary matters are inserted in the transcript, the costs of the same will be taxed to the party at fault, if the proper motion is made therefor.

The principal errors relied upon in this case are,—1. That the evidence is not sufficient to sustain the verdict. The testimony tends to show that the plaintiffs in error and others went, at the time stated in the petition, to the house of the defendant in error, and stripped him, inflicted many blows upon his person, and covered him with tar. Upon this point there is practically no dispute in the testimony. The defendant in error claims that the abuse he received caused a rupture, from which his health has been greatly impaired. There is other testimony in the record, however, which clearly shows that the rupture complained of had existed for a long time prior to

the injuries inflicted by the plaintiffs in error. As to other injuries, however, the allegations of the petition are fully sustained. The first objection, therefore, is untenable.

2. The second objection is, that the cross-examination of the defendant and his witnesses was too much restricted. The answer being a general denial, the only issue was as to the truth of the allegations of the petition. A persistent effort was made, however, on behalf of the plaintiffs in error, to introduce affirmative proof, on cross-examination, which the court properly refused to admit.

3. Objection is made to the attorney fees, and it is claimed they cannot be recovered under our statutes.

In *Roberts v. Mason*, 10 Ohio St. 277, it was held that attorney fees were proper in this class of cases. An examination of the case, however, shows that the court approved of the rule of exemplary or vindictive damages, and therefore the court say: "The jury, which has the power to punish, has necessarily the right to include the consideration of proper and reasonable counsel fees in their estimate of damages." The court held that, in actions upon contract, or nominally in tort, that attorney fees ought not to be included. This case was cited with approval in *Smith v. Pittsburg etc. R'y Co.*, 23 Ohio St. 10. In this state, however, vindictive or exemplary damages are not allowed: *Boyer v. Barr*, 8 Neb. 71; 30 Am. Rep. 814; *Roose v. Perkins*, 9 Neb. 315; 31 Am. Rep. 409; *Riewe v. McCormick*, 11 Neb. 264; *Boldt v. Budwig*, 19 Id. 739. Damages being compensatory, therefore, and not vindictive, we know of no rule that would require the allowance of attorney fees in an action of tort, and deny the same in an action on contract. In both classes of cases the plaintiff recovers according to his rights, and justice will be best subserved by applying the same rule in both classes, unless where the statute provides differently. The rule adopted in *Dow v. Updike*, 11 Neb. 97, *Hardy v. Miller*, 11 Id. 399, *Otoe County v. Brown*, 16 Id. 398, is applicable to cases of tort. This rule has been in force ever since the organization of state courts, and if changed it should be by statute.

The defendant in error has leave to remit from the judgment within twenty days the sum of two hundred dollars attorney fees, and upon condition that the *remittitur* is made, the judgment of the district court will be affirmed; otherwise, it will be reversed.

ATTORNEYS' FEES AS ELEMENT OF DAMAGES. — Although authorities conflict, the general rule, supported by the greater number of cases, undeniably is, that counsel fees, as a mere element in determining the amount of damages, should not be taken into consideration whether the action is one *ex contractu* or *ex delicto*. The rule is well stated by Moore, J., in *Lunda v. Obert*, 45 Tex. 539-544, where he says: "When a party is entitled to vindictive damages, the jury in making up their verdict may, no doubt, if they are so disposed, consider the plaintiff's expenses in prosecuting the suit. And if their verdict is not so grossly excessive as to warrant the court setting it aside, no inquiry can be made as to the inducement operating on their minds in reaching their conclusion. And there are, unquestionably, cases in which the court has suggested such expenses as a proper subject for the consideration of the jury in fixing damages that should be allowed the plaintiff. But we are of opinion that the decided weight of authority is against the proposition that the plaintiff has the right to claim his counsel fees, even in such cases, as a part of his damages, for if so, and the jury failed to allow them, it would seem their verdict should be set aside. But no case can be found, we imagine, where the verdict has been set aside on this account. There is, unquestionably, some conflict in the decisions, and we readily admit that some of the earlier decisions of this court tend in some degree to maintain the proposition that when fraud or malice are of the gist of plaintiff's action, he may recover his counsel fees in prosecuting the suit as part of his damages. But while we do not mean to intimate that there are no cases in which the plaintiff may be entitled to their recovery, he is only entitled to do so, as we think, where they are a part of the damages resulting as the natural and proximate consequence of the act complained of." To the same effect, *Hicks v. Foster*, 13 Barb. 663; *College v. Davis*, 47 Tex. 131; *Stopp v. Smith*, 71 Pa. St. 285; *Warren v. Cole*, 15 Mich. 264; *Stimpson v. Railroad*, 1 Wall. Jr. 164. In the last-named case, it was decided that the plaintiff could not recover in a patent case, as part of his actual damages, any expenditure for counsel fees or other charges, though necessarily incurred to vindicate the rights given him by his patent. In *Lincoln v. Schenectady etc. R. R. Co.*, 23 Wend. 425, Nelson, C. J., said: "The charge as to expenses, beyond taxable costs and counsel fees in conducting the suit as a specific item of damages to be taken into account, I am inclined to think was erroneous. These have been fixed by law, which is as applicable in damages as in debt." So in *Day v. Woodworth*, 13 How. 363, Grier, J., remarks: "That while damages assessed by way of example may indirectly compensate the plaintiff for money expended as counsel fees, these fees cannot be taken as the measure of punishment or as a necessary element in its infliction."

Again, in *Howell v. Scroggins*, 48 Cal. 356, the court below had instructed the jury that they were not limited, in assessing damages, to mere compensation, but might give exemplary damages, and could take into consideration the plaintiff's expenses in prosecuting the suit. But the appellate court, after a review of the cases, reversed the judgment, and in doing so said: "The damages found by the jury were not excessive, and if we could feel at liberty to disregard the error of the court below, or were satisfied that it did not influence the action of the jury, we should affirm the judgment." The doctrine of this case was reaffirmed as to the disallowance of counsel fees as an element of damages in an action of trespass, in the case of *Falk v. Waterman*, 49 Cal. 224. In *Earl v. Tupper*, 45 Vt. 275-287, the court, through Wheeler, J., said: "The great weight of authority seems to be opposed to the allowance of counsel fees and other expenses of litigation, beyond taxable costs, as an

element of damages, even in cases where exemplary damages are proper. At least, there is so much authority that way that this court is at liberty to disregard those the other way, if necessary, in order to follow the rule most in accordance with legal principles and sound reason. The charge in this case left the jury at liberty to consider the expenses of the suit to the plaintiff, for counsel fees and trouble, not taxable costs, and to allow these expenses to the plaintiff as a part of the exemplary damages if they saw fit. This is considered to have been erroneous." This case was affirmed on this proposition in *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197, and *Morrison v. Darling*, 47 Vt. 67. And in the late case of *Kelly v. Rogers*, 21 Minn. 146-153, Young, J., says: "Punitive or exemplary damages are inflicted, not to compensate the plaintiff for his loss or damage, but with a view to punish the defendant for his wanton, malicious, oppressive, or outrageous conduct, and to deter him and others from the commission of like offenses. The expenses of the prosecution can afford no criterion by which to judge of the degree of malice, oppression, or outrage of which the defendant has been guilty, and for which he is to be punished, nor can the *quantum* of punishment which the defendant has deserved, and which will prevent the repetition of the offense by him or others, be measured by these expenses. There is therefore no reason why these expenses should be considered by the jury in arriving at that sum which, in their judgment, will be sufficient as a punishment and an example." In the case of *Fairbanks v. Witter*, 18 Wis. 301-304, 86 Am. Dec. 765, the following strong language was used by Cole, J., in delivering the opinion, after a review of the authorities on the subject: "The opinions of the court in the other cases are equally emphatic, and fully vindicate the soundness of the doctrine that the jury have no right to include in their verdict counsel fees and the other expenses of litigation. Nor does it make any difference or change the rule that the action is one where punitive damages may be given. For if the expenses of litigation, counsel fees, etc., may be assessed by the jury, it is very clear that it must be upon the principle that they are consequential damages, and relate to the amount of compensation, rather than refer to damages which may be inflicted by way of penalty or punishment for aggravated misconduct. The question put was, What, in the judgment of the witness, was a fair compensation to a lawyer for prosecuting the action? This shows most conclusively that the party rested his claim for counsel fees upon the ground of compensation, recompense, or satisfaction for expenses incurred, and not upon the ground that the action was one in which vindictive and exemplary damages might be given. But, in any view, we think the jury had no right to assess counsel fees as a part of the damages, particularly in this state, where we have a statute regulating the costs and fees which the successful party may recover, and which is applicable to this as well as other cases." See, also, as sustaining the rule, *Leffingwell v. Elliott*, 21 Pick. 203, and *Reggio v. Braggiotti*, 7 Cush. 166, where it is said: "But the counsel fees cannot be allowed. These are expenses incurred by the party for his own satisfaction, and they vary so much with the character and distinction of counsel that it would be dangerous to permit him to impose such a charge upon an opponent; and the law measures the expenses incurred in the management of a suit by the taxable costs." To the same effect, *Young v. Courtney*, 13 La. Ann. 192; *Hale v. New Orleans*, 13 Id. 499; *Henry v. Davis*, 123 Mass. 345.

So it has been held by the United States supreme court that counsel fees were not recoverable as part of the damages in an action on an injunction bond: *Orbrichs v. Spain*, 15 Wall. 211. Nor in a suit in admiralty: *The Bal-*

timore, 8 Wall. 377. Nor in cases of prize: *The Nuestra Señora de Regla*, 17 Id. 29. Even in states where counsel fees are allowed by statute under certain contingencies, plaintiff cannot recover reasonable counsel fees, unless "defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense": *Guernsey v. Shellman*, 59 Ga. 796; *Mayor etc. of Savannah v. Waldner*, 49 Id. 316. In *Jault v. South*, 2 Dak. 46, it is held that the prevailing party cannot recover fees paid his attorney or counsel, unless there is an agreement or contract, express or implied, for their payment, and the statute authorizing the recovery, in an action for a wrongful taking or detention of personal property, of damages for the detention thereof, does not change this rule. And again, in an action to recover the possession of personal property, the plaintiff is not entitled to recover counsel fees as actual damages for prosecuting the case, when the elements of malice, gross negligence, or oppression do not mingle in the controversy: *Winstead v. Hulme*, 32 Kan. 568. In Louisiana, counsel fees are not recoverable as damages in a suit not tainted with fraud or malice: *Massic v. Baily & Co.*, 33 La. Ann. 485; *Eatman v. New Orleans etc. R'y Co.*, 35 Id. 1018. Nor are they recoverable in a suit for past damages: *Day v. New Orleans etc. R'y Co.*, 35 Id. 694; *Campbell v. Short*, 35 Id. 465.

While the foregoing cases seem to establish the rule, both in a majority of the states and in the federal courts, that fees paid an attorney or counsel cannot be recovered as an element of damages, still authority is not wanting to show that in some of the states the contrary doctrine is firmly established, though it may be, as was said in *Kelly v. Rogers*, 21 Minn. 153, that, "except in the Connecticut cases, the question was not much considered, and the doctrine of those cases is opposed to the weight of authority, and the same courts which hold that the jury in inflicting punitive damages may take into consideration the probable expenses of the suit refuse to receive evidence of the amount of those expenses." However, in *Roberts v. Mason*, 10 Ohio St. 277-282, the court say: "On this point the authorities are not uniform; but the better opinion now seems to be, that in actions *ex contractu*, and in cases nominally in tort, where no wrong in the moral sense of the term is complained of, the fees of counsel ought not to be included in the estimate of damages; but in cases where the act complained of is tainted by fraud, or involves an ingredient of malice or insult, the jury which has the power to punish necessarily has the right to include the consideration of proper and reasonable counsel fees in their estimate of damages." And this rule has been affirmed in *Noble v. Arnold*, 23 Ohio St. 264, and *Finney v. Smith*, 31 Id. 529, 27 Am. Rep. 524, note 528, where in an action of libel it was held that the jury in estimating compensatory damages might take into consideration plaintiff's reasonable counsel fees, although there were mitigating circumstances not amounting to justification. In Connecticut, the rule is well established that in actions sounding in tort, where the injury complained of is inflicted wantonly and maliciously, the plaintiff's counsel fees may be taken into consideration in estimating exemplary damages: *Linsley v. Bushnell*, 15 Conn. 225; 38 Am. Dec. 79; *Noyes v. Ward*, 19 Conn. 250; *Ives v. Carter*, 24 Id. 392; *Dalton v. Beers*, 38 Id. 529; *Dibble v. Morris*, 26 Id. 416. Or they may be estimated where defendant has been guilty of willful and malicious fraud: *Platt v. Brown*, 30 Id. 336. But in cases where the injury is not wanton or malicious, nor the fraud gross, the jury can give only actual damages, and cannot take into consideration, in estimating such damages, the plaintiff's counsel fees: *St. Peter's Church v. Beach*, 26 Id. 355; *Dibble v. Morris*, 26 Id. 416. It has been held that in cases proper for the infliction

of exemplary damages, the jury, in estimating them, have a right to take into consideration the probable expense of the litigation, and that it is competent for the plaintiff to prove the reasonable and proper fee of his counsel: *New Orleans etc. R. R. Co. v. Allbritton*, 38 Miss. 242; 75 Am. Dec. 98. In an action of ejectment on a covenant of warranty, the necessary expenses of the action may be recovered: *Pitkin v. Leavitt*, 13 Vt. 379; *Ryerson v. Chapman*, 66 Me. 557. And in an action for infringement of a patent, counsel fees have been allowed as a portion of the damages: *Allen v. Blunt*, 2 Wood. & M. 121. In an action for the wrongful revocation of an agreement to submit a controversy to arbitration, the plaintiff may recover, as an element of his damages, counsel fees incurred in preparation for trial: *Pond v. Harris*, 113 Mass. 114. So a town may recover counsel fees where it defends an action brought against it to recover for an injury caused by the negligence of the defendant in creating an obstruction upon the highway, after he is notified of the pendency of the suit and requested to defend it: *Inhabitants of Westfield v. Mayo*, 122 Id. 100. And where a corporation has contracted with defendant to secure a right of way for it free of expense, but the defendant failing to perform his contract the corporation secured the right of way in the usual manner, it was held that the corporation might recover, as an element of damages, the counsel fees incurred in the settlement of land damages: *New Haven etc. Co. v. Hayden*, 117 Id. 433.

INJUNCTION, ATTACHMENT, AND OTHER BONDS. — It is generally held that the attorney's or counsel fees necessarily incurred in obtaining a dissolution of an injunction may be recovered as damages secured by the undertaking, when it is finally decided that the injunction ought not to have been granted: *Holmes v. Weaver*, 52 Ala. 516; *Spring v. Collector of Olney*, 78 Ill. 101; *Cummings v. Burseson*, 78 Id. 281; *Noble v. Arnold*, 23 Ohio St. 264; *Packer v. Nevin*, 67 N. Y. 550; *Wallace v. York*, 45 Iowa, 81; *Rose v. Post*, 56 N. Y. 603. But on an assessment of damages upon an undertaking given upon the granting of a temporary injunction, it has been decided that counsel fees are not allowable except when incurred solely because of such injunction: *Disbrow v. Garcia*, 52 Id. 654. So it has been ruled that where a defendant was enjoined from removing his slaves, and upon an order of seizure they were taken from his possession, but a decree was subsequently rendered in his favor, he cannot recover as damages his counsel fees incurred in defending the suit: *McDaniel v. Crabtree*, 21 Ark. 431; compare *Moriarty v. Galt*, 125 Ill. 417. In an action for wrongfully and vexatiously suing out an attachment, where malice is the gist of the action, counsel fees in defending against the wrongful act of the defendant, if reasonable and necessarily incurred, may be proved and considered by the jury in estimating the damages: *Marshall v. Betner*, 17 Ala. 832; *Donnell v. Jones*, 13 Id. 490; 52 Am. Dec. 194; *Wilson v. Root*, 43 Ind. 486; *Lawrence v. Hagerman*, 56 Ill. 68; 8 Am. Rep. 674. However, such fees were denied in *Vorse v. Phillips*, 37 Iowa, 428. In an action on an indemnity bond, plaintiff may recover counsel fees as damages necessarily incurred in defending the subject of the bond: *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279.

MALICIOUS PROSECUTION. — In actions for malicious prosecutions and false imprisonment, evidence of the payment of an attorney's fee and expenses incurred in defending the criminal suit is competent, and should be considered by the jury in fixing damages, no matter by whom such fee was paid: *King v. Ward*, 77 Ill. 603; *Sears v. Hathaway*, 12 Cal. 277; nor that it is as yet not paid: *Zeigler v. Powell*, 54 Ind. 173.

FISK & Co. v. McNEAL.

[23 NEBRASKA, 726.]

NEGOTIABLE INSTRUMENTS. — FILLING BLANK in the lower margin of a note, naming a date for its maturity, does not make the note payable on such date, but it remains payable on the date named in the body of the note.

NEGOTIABLE INSTRUMENTS. — STATUTE OF LIMITATIONS is a good defense to an action on a promissory note instituted more than five years after its maturity as shown by the date named in the body of the note, but less than five years after maturity as shown by the date named in the margin of the note.

J. H. Rushton, for the plaintiff in error.

J. W. Eller, for the defendant in error.

REESE, C. J. This action was for the purpose of recovering the amount due upon two promissory notes, each bearing date of July 1, 1878, and payable ten days after date. They were written upon similar printed blanks, which we here copy: —

“\$, 187...
 “ after date ... promise to pay to
 the order of
 dollars,
 at
 Value received.

“No. Due”

This blank being filled, the notes read as follows: —

1. “\$50.00. FRANKLIN GROVE, ILL., July 1, 1878.
 “Ten days after date I promise to pay to the order of D. B. Fisk & Co., Chicago, Ill., fifty dollars, at ten per cent interest from date. Value received. M. T. MINOR.
 “No. . . . Due Sept. 30, 1878.”
2. “\$55.39. FRANKLIN GROVE, ILL., July 1, 1878.
 “Ten days after date I promise to pay to the order of D. B. Fisk & Co., Chicago, Ill., fifty-five and thirty-nine cents dollars, at ten per cent interest. Value received. M. T. MINOR.
 “No. Due Oct. 30, 1878.”

This action was commenced on the eighteenth day of September, 1883. Defendant pleaded the statute of limitations. Upon trial, a judgment was rendered in her favor. Plaintiff prosecutes error to this court, and alleges for error the ruling of the court in holding the notes to be barred by the statute of limitations.

The question presented for decision is, Does the filling of the

blank in the lower margin of the notes, naming a date for their maturity, make the notes payable on such dates, instead of the date named in the body of the note?

The testimony shows that, at the time of and prior to the execution of the notes, defendant resided in Franklin Grove, in the state of Illinois, and was indebted to plaintiff in the sum of \$105. Plaintiff demanded payment, but was informed by letter from defendant, dated June 25, 1878, that she could not make the payment at that time, but would be able to do so the coming fall,—by the middle or last of September. She was then requested to execute her notes for the amount due, and send them to plaintiff, which she did, the notes being the ones sued on in this case. It may be assumed, also, that the notes were written by her in the form in which they now appear, and it may be that she intended to make them payable at the time designated in the margin. It may be also assumed that plaintiff so treated them, as a favor to defendant, and so relied upon them. But while this is a matter which, if true, should appeal strongly to the conscience of a debtor, we, not being the conscience keepers of litigants, must decide the case according to the law as we find it applicable to the contract which the parties have made. As may be seen by the notes, they fix a definite time within which they mature,—“ten days after date.” It cannot be said as matter of law that the marginal note or memorandum could any more control the body of the note than could the marginal figures, when different from the amount expressed in the body or written portion of the note, control the amount which a holder would be entitled to upon payment or judgment. Upon this point we think the American cases are substantially uniform, that where a difference appears between the words and figures, evidence cannot be received to explain it; but the words in the body of the paper must control: Daniels on Negotiable Instruments, sec. 86, and cases there cited. Hence, if an alteration is made in the marginal figures so as to make them correspond with the writing, it is not such an alteration as to vitiate the note.

In *Smith v. Smith*, 1 R. I. 398, 53 Am. Dec. 652, the court said: “We do not think the marginal notation constitutes any part of the bill. It is simply a memorandum or abridgment of the contents of the bill for the convenience of reference. The contract is perfect without it. If this is so, any alteration in the figures cannot avoid the contract, because it is no alteration, either material or immaterial, in the contract.” See

also Randolph on Commercial Paper, sec. 105. So we think it must be in this case. The marginal memorandum is only for convenience in the matter of ascertaining the date of the maturity of the note without the necessity of reading it. It might serve also as an important aid in a case where by accident the body of the instrument was rendered illegible, or where it was so imperfectly written as to render the intention of the maker doubtful. But we have no such case here. No question can arise as to the true time of the maturity of the note when read from the written portion. Suit might have been instituted at any time after the expiration of the ten days, — with the three days of grace added, — and it must be held that the statute began to run at that time, and that the action was barred at the time the suit was commenced.

The judgment of the district court is affirmed.

AS BETWEEN MARGINAL WORDS or figures and those in the body of the note or bill, the latter control: *Williamson v. Smith*, 1 Cold. 1; 78 Am. Dec. 478, and note 486.

STATE EX REL. ATTORNEY-GENERAL v. ATCHISON AND NEBRASKA R. R. Co.

[24 NEBRASKA, 143.]

PARTY. — IN QUO WARRANTO PROCEEDING AGAINST CORPORATION itself, for misuser or non-user of its corporate franchises, it is the only necessary party defendant in the case. But if judgment of ouster is rendered, or the charter vacated or set aside, the rights of all parties against the defendant will be protected.

CONSOLIDATION OF RAILROADS — CONSTRUCTION OF STATUTE. — The Nebraska statute, which provides when and how railroad companies may consolidate, authorizes the consolidation of two lines of railway only where the lines thus consolidated will form one continuous railroad.

ONE RAILROAD AIDING ANOTHER IN CONSTRUCTING ROAD — LEASING RAILROAD — CONSTRUCTION OF STATUTE. — Under the Nebraska statute, the authority of one company to aid another in the construction of its railroad is for the purpose of making connection between the two roads; and the right of any company to lease or purchase a railroad constructed by another company relates only to cases where the two lines would be continuous and connected.

RAILROAD MAY NOT LEASE ITS ROAD TO ANOTHER COMPANY unless specially authorized by charter or aided by legislative authority, and in the latter case the exact statute relied on as granting such authority must be pointed out; nor may one railroad make a contract to receive and operate the road, franchises, and property of another corporation without similar authority.

RAILROAD COMPANY IS GUILTY OF MISUSER AND NON-USER OF FRANCHISES, AND SUCH FRANCHISES ARE SUBJECT TO FORFEITURE, where it surrenders all its powers, rights, and franchises to another corporation by an unauthorized lease extending over a long period of time.

CONSOLIDATION OF RAILROADS. — THE CONSTITUTION of Nebraska absolutely prohibits the consolidation of parallel and competing lines of railroad; the word "consolidate" being used in the sense of join or unite, and the prohibition against such joinder is a prohibition against leasing such roads.

RAILROAD CORPORATION, ALTHOUGH ORGANIZED PRIOR TO ADOPTION OF CONSTITUTION, IS SUBJECT TO PROVISIO THEREIN restricting parallel and competing lines of road from consolidating or from leasing such roads, where such corporation was organized for the special purpose of building a competing line of road, and had no authority under the statute to make a lease, and was deprived of no rights by the constitutional provision.

CONSTRUCTION OF CONSTITUTIONAL PROVISION — RAILROADS. — Section 5, article 11, of the constitution of Nebraska, was intended to restrict the issue of stock and bonds by a railroad corporation to the actual consideration received. One of the objects of the provision was to enable all parties to know the actual cost of all railroads within the state, so that the legislature, in providing for taxing them and regulating the charges for transportation of persons and property, might be enabled to do so advisedly, and pass laws which should be just alike to the railroad companies, the public, and individuals.

QUO WARRANTO.

William Leese, attorney-general, and C. G. Dawes, for the relator.

T. M. Marquett, for the respondent.

J. M. Woolworth, for the trustees in the mortgages on respondent's road.

MAXWELL, J. This is an original action brought in this court by the attorney-general to oust the defendant from its franchises. The attorney-general alleges in the information that, "on the twenty-fifth day of April, A. D. 1871, articles of incorporation were duly filed in the office of the secretary of state of Nebraska by A. J. Cropsey, A. A. Egbert, T. E. Calvert, George Morrison, and O. Chanute, duly incorporating, under the laws of the state of Nebraska, the Atchison, Lincoln, and Columbus Railroad Company. The object and purpose of this company was to construct, maintain, and operate a line of railroad, with single or double tracks, and with all the necessary branches, fences, bridges, warehouses, elevators, station-houses, and such other appurtenances as might be thought necessary, extending said line of railroad

from a point at the southern line of the state of Nebraska, where the Atchison and Nebraska Railroad Company crosses said state line, and from thence running northward and westward, through the counties of Richardson, Pawnee, Gage, Johnson, Lancaster, Seward, and Butler, by way of Lincoln, to the town of Columbus, on the Union Pacific railway, in Platte County. A copy of the articles of incorporation is attached to the petition as an exhibit.

"2. That on the eighteenth day of August, A. D. 1871, and long before the aforesaid line of railroad was completed, the said Atchison, Lincoln, and Columbus Railroad Company consolidated all of its stock and property of every kind and nature, with the stock and property of every kind of the Atchison and Nebraska Railroad Company, a corporation organized under the laws of the state of Kansas, and it was agreed in said articles of consolidation, a copy of which was filed in the office of the secretary of state of this state, that the aforesaid two consolidating companies should constitute but one corporation in law, and to be known and named the Atchison and Nebraska Railroad Company. [A copy of the said articles of consolidation is attached to the petition, and that part of the line of railroad of the defendant lying and being in the state of Nebraska is sought to be affected by this proceeding.]

"3. Your petitioner would further give the court to understand and be informed that at the time of the incorporation of the Atchison, Lincoln, and Columbus Railroad Company, as well as at the time of the consolidation, the financial circumstances of the defendant were limited, and they were unable to build the said railroad from the south line of the state of Nebraska to Columbus, as aforesaid, and the said company applied to the tax-payers of the several counties through which said line of railroad was to pass for aid, to enable the said company to construct and maintain their railroad as aforesaid.

"4. That the tax-payers and inhabitants along said proposed line of railroad, for the purpose of obtaining a railroad, and getting direct communication with Kansas, Missouri, Illinois, and other eastern and southern states, did, as in such cases made and provided, vote, issue, and deliver to the defendant a large amount of ten-per-cent coupon bonds, aggregating, from the counties of Richardson, Pawnee, Johnson, Gage, and Lancaster, more than five hundred thousand dollars.

"5. That on or about the fifteenth day of January, 1872, said railroad was completed to Lincoln, in Lancaster County, Nebraska, and from said day until January 1, 1880, was operated and maintained as a competing line of railroad with the Burlington and Missouri River Railroad Company in Nebraska (a corporation organized under the laws of this state), for all the freight and passenger traffic lying and being between the road of this defendant and a branch line of the aforesaid Burlington and Missouri, running from Lincoln, in Lancaster County, to Nemaha City, in Nemaha County, by the way of Nebraska City, on the east side, and with a branch line of said Burlington and Missouri, running from Lincoln by way of Crete to Beatrice, in Gage County, on the west side of the defendant's line. That during all of the time aforesaid there was a strong competition between the aforesaid lines, thereby producing a reasonable but low rate of charges for freight and passenger traffic, and the people living within the territory above described received a great advantage by reason of the low and reasonable rates charged for the transportation of freight and passengers on the defendant's railroad, resulting from the competition aforesaid. That by the competition aforesaid the freight belonging to the people using defendant's line of railroad was shipped south to the city of Atchison, in Kansas, and from there connected with other lines of railroads that were competing with the aforesaid Burlington and Missouri River railroad for Chicago freight, and for other points east. That freight coming from Chicago and other eastern points to the people living along the line of **the defendant's railroad** was brought at greatly reduced rates, and all the people living in the southeastern quarter of our state received the many advantages derived from competing railroads.

"6. That on the first day of January, A. D. 1880, as aforesaid, for the purpose of defrauding the people living along the line of their railroad, and for the purpose of destroying the competition as aforesaid, the said defendant, the Atchison and Nebraska Railroad Company, disregarding its duties to the state and to the public, unlawfully and willfully entered into an agreement with the aforesaid Burlington and Missouri River Railroad Company to lease their said line of railroad, and all their rights, privileges, franchises, and property of every description to the above last-named railroad company, and on said last-named day the defendant did grant, lease, and

demise to the said Burlington and Missouri River railroad, for the full term of 999 years, all of their railroad, roadway, lands connected with the use and operation of their road, and all machine-shops, depots, and all easements and appurtenances thereunto belonging, as well as all such property as should thereafter be acquired. [A copy of said lease is attached to and made a part of the petition.] In pursuance with the terms of said lease, the defendant, on said day, gave to the said Burlington and Missouri River Railroad Company full and absolute possession and control of all its railroad, roadway, rights, privileges, and franchises, its earnings, and property of every description. And ever since the first day of January, A. D. 1880, the defendant company has utterly and willfully failed and neglected to maintain or operate their said railroad or any other railroad in this state, and has failed in the discharge of its duty to the state and to the public during all of said time, whereby the rights, privileges, and franchises of said defendant in the state of Nebraska have become and are subject to forfeiture.

"7. That afterwards, on the fifth day of April, 1880, the defendant conveyed and assigned absolutely all of its lands, bonds, moneys, and property of every description, not included in the lease hereinbefore mentioned, to the aforesaid Burlington and Missouri River Railroad Company. [A copy of said conveyance and assignment is attached to and made a part of the petition.]

"8. And your petitioner would further show to the court that the defendant's line of railroad and the line owned by the Burlington and Missouri River Railroad Company in Nebraska were not connecting or continuous lines of railroads, but in truth and in fact the two roads were parallel and competing lines, and the lease, conveyance, and assignment as aforesaid were and are *ultra vires*, in violation of section 3 of article 11 of the constitution of the state of Nebraska, and against public policy.

"9. That on the said first day of January, A. D. 1880, the aforesaid Burlington and Missouri River Railroad Company in Nebraska sold, assigned, and transferred all of their railroads, leaseholds, rights of action, contracts, stock, franchises, and all other property of every description whatsoever, to the Chicago, Burlington, and Quincy Railroad Company, a foreign corporation, incorporated under the laws of the states of Illinois and Iowa, and not incorporated under the laws of Ne-

braska, nor has it filed a copy of its articles of incorporation with the secretary of state of Nebraska. [A copy of the above-mentioned deed of sale and assignment is attached to the petition and made a part thereof.]

"10. That after the defendant made the lease of its railroad and the transfer of all its property, as aforesaid, the management and control of the defendant's line was maintained and operated by the said Burlington and Missouri River railroad, and by the transfer of the said last-named company to the Chicago, Burlington, and Quincy Railroad Company, the said Chicago, Burlington, and Quincy Railroad Company still continues to operate and maintain the defendant's line in this state, thereby consolidating all of the property, franchises, and earnings of the defendant's line with the aforesaid competing and parallel lines of the said Burlington and Missouri River Railroad Company, as now owned and controlled by said Chicago, Burlington, and Quincy Railroad Company.

"11. That from and after the date of the above transfer, to wit, January 1, 1880, the rates of freight for transportation on the defendant's lines were increased by the lessee and its assignee from fifty to seventy-five per cent of the rate charged by the defendant, and in many cases it was doubled; that all competition was destroyed in the southeastern quarter of the state by reason of the aforesaid transfers, and all the grain, stock, and other classes of freight along the defendant's line, shipped to eastern and southern points, was carried north by the lessee, and the volume of business done along the defendant's line was diverted outside of the usual channel of trade; that the people living along the line of the defendant's road are defrauded by the transfers aforesaid, and the large amount of bonds voted and delivered to the defendant, to aid in the construction of the railroad, are without consideration, and yet the said bonds are still presumed to be a legal liability against said counties.

"12. That the defendant corporation, the Atchison and Nebraska Railroad Company, has ceased to maintain and operate any railroad in the state of Nebraska; that said railroad corporation, the Atchison, Lincoln, and Columbus Railroad Company, as consolidated with the Atchison and Nebraska Railroad Company, has willfully failed and neglected to keep up and maintain any railroad in this state, as by their articles of incorporation they are required to do, but on the contrary has abandoned its lawful business, and the end and object for

which it was created, whereby the rights and privileges and franchises of said defendant corporation in this state have become subject to forfeiture. Wherefore plaintiff prays that the corporate rights, privileges, and franchises may be declared forfeited, and the said defendant be ousted therefrom; that all the rights, privileges, and franchises of the defendant within the state of Nebraska be canceled and annulled, and that said corporation be dissolved; that the court may appoint three trustees to take charge of the property of said corporation, to collect the debts, and pay the liabilities, if any, and the surplus paid into the state treasury for the benefit of the school fund, as in other cases of forfeiture; and for such other and further relief as equity and justice may require."

The exhibits attached to the petition and made a part of it show that, on the 24th of May, 1867, certain residents of the city of Atchison, Kansas, organized a corporation under the laws of that state, for the purpose of constructing a railroad from some point in the city of Atchison to some point on the north line of the state of Kansas, not farther west than twenty-five miles from the Missouri River, the length of said railroad not to exceed forty-five miles. The capital stock of said company was fixed at four hundred thousand dollars. In April, 1871, the Atchison, Lincoln, and Columbus Railroad Company was organized under the laws of the state of Nebraska. "The object and purpose of this company are to construct, maintain, and operate a railroad with single or double tracks, and with all necessary branches, fences, bridges, warehouses, elevators, station-houses, and such other appurtenances as may be thought necessary or convenient, extending from a point on the southern line of the state of Nebraska, where the Atchison and Nebraska railroad crosses said state line northward and westward through the counties of Richardson, Pawnee, Gage, Johnson, Lancaster, Seward, and Butler, by way of Lincoln, to the town of Columbus, on the Union Pacific railroad, with a branch road running westward through the counties of Richardson, Pawnee, Johnson, Gage, Jefferson, and Saline, to the west line of the state." The capital stock was fixed at the sum of five hundred thousand dollars. In August, 1871, the Atchison and Nebraska Railroad Company and the Atchison, Lincoln, and Columbus Railroad Company were consolidated under the laws of this state, the first article of consolidation being as follows: "The Atchison and Nebraska Railroad Company, a corporation organized and exist-

ing under the laws of the states of Kansas and Nebraska, has constructed and now in operation its railroad from Atchison northwesterly to the state line between Kansas and Nebraska, and the said Atchison, Lincoln, and Columbus Railroad Company, a corporation organized and existing under the laws of the state of Nebraska, is authorized by virtue of said laws and its charter to construct, maintain, and operate a railroad from a point on the state line between Kansas and Nebraska, to which the Atchison and Nebraska railroad is constructed, by way of Lincoln, to Columbus, a point on the Union Pacific railroad in said state of Nebraska, and also a certain branch of said railroad named in the articles of incorporation. And whereas the roads as now constructed and authorized to be located and completed in said states of Kansas and Nebraska, under their respective charters and the laws of said states, form a continuous line extending from Atchison to Lincoln, and thence to Columbus, and are authorized by the laws of said states of Kansas and Nebraska to consolidate their stock and property with each other," etc. The articles of consolidation are set out at length, the capital stock of the company being fixed at two million dollars.

The defendant demurs to the petition upon two grounds: 1. That there is a defect of parties defendant; 2. That the facts stated in the information are not sufficient to entitle the state to the relief prayed for against the defendant.

The rule is well settled that in a proceeding in *quo warranto* to dissolve a corporation or declare a forfeiture of its charter, or to oust it from the exercise of franchises which it usurps, it must be against the corporation itself, and not merely against its individual members. If the corporation has by the abuse or the non-use of its franchises rendered itself liable to the forfeiture of its charter, such forfeiture can properly be declared and enforced only in a proceeding to which the corporation is a party: *State v. Taylor*, 25 Ohio St. 280; *People v. Bank of Hudson*, 6 Cow. 217.

In the latter case, the court say: "It is objected, in the first place, that the information, being against the defendants by their corporate name, is bad. To this it may be answered, the information is merely descriptive. It is not an affirmation that the defendants are a corporation, but that by the name of the president, directors, and company of the bank of Hudson, or using that name, they have done the acts in the information alleged. And it then calls on them to answer by

what authority. Besides, the statute authorizes proceedings against the corporation. The judgment must be against the corporate name. A corporation created by the legislature may lose its franchises by a misuser or a non-user of them. They may be resumed by the government under a judgment upon a *quo warranto* to ascertain and enforce the forfeiture: *Terrett v. Taylor*, 9 Cranch, 51. The judgment to be given is a judgment of seizure, which produces a dissolution of the corporation."

As the proceeding is directed against the corporation itself for misuser and non-user of its corporate franchises, it is the only necessary party defendant in the case. If, however, the court should find it necessary to render a judgment of ouster against the defendant, and vacate and set aside its charter, the rights and *bona fide* claims of all parties against the defendant will be protected. The first ground of demurrer, therefore, is overruled.

Section 89 of chapter 16 of the Compiled Statutes provides: "Whenever the lines of railroad of any railroad companies in this state, or any portion of such lines, have been or may be constructed so as to admit the passage of burden or passenger cars over any two or more such roads continuously, without break of gauge or interruption, such companies are hereby authorized to consolidate themselves into a single corporation, in the manner following: The directors of the said two or more corporations may enter into an agreement, under the corporate seal of each, for the consolidation of the said two or more corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the number of the directors thereof, which shall not be less than seven; the time and place of holding the first election of directors; the number of shares of capital stock in the new corporation; the amount of each share; the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporation; the manner of compensating stockholders in each of said two or more corporations who refused to convert their stock into stock of such new corporation, with such other details as they shall deem necessary to perfect such consolidation of said corporations; and such new corporations shall possess all the powers, rights, and franchises conferred upon such said two or more corporations, and shall be subject to all the restrictions, and perform all the duties imposed by the provisions of this sub-

division; provided, that all stockholders in either of such corporations shall be paid the market value of said stock at the date of such consolidation."

This is section 18 of an act passed by the territorial legislature, entitled "An act to create and regulate railroad companies," approved February 8, 1864, and is section 89 of chapter 25 of the Revised Statutes of 1866.

The act including this provision was copied substantially from the statute of Ohio of 1851, "relating to railroad companies": 2 Curwen, 1075. The construction of this section was before the supreme court of Ohio in *State v. Vanderbilt*, 37 Ohio St. 590, where it was held that the word "continuously," in the section above quoted, was a restriction upon the power to consolidate, and that this right existed only where the lines when consolidated would form one continuous line over which freight and passengers might be carried without transfer, and that it did not apply to roads which when united would not form a continuous line. The court say: "The attorney-general says, and the record supports the statement, that these roads are 'for sixty miles lying parallel and near to each other.' That they are, indeed, in the largest sense, parallel and competing roads, seems to be beyond dispute, and it may be fairly inferred from the record that a leading object in making the consolidation was to destroy that competition. That being true, the lines of these roads are not, in my judgment, 'so constructed as to admit the passage of burden or passenger cars over two or more of such roads continuously,' within the proper meaning of section 3379. That the mere physical ability to pass cars from one road to the other satisfies the statute, is a construction of it which is wholly inadmissible, for the provision requiring such connection would be without meaning. In imposing that restriction upon consolidation, the legislature intended, not merely that the physical fact should exist, but that such consolidation should only be made for the very purpose of passing freight and passengers over both lines, or some material parts thereof not necessarily in a direct or straight line, but continuously. . . . Consolidation for the transportation of freight and passengers continuously is a thing which the legislature might well desire to encourage, as it may be advantageous alike to the public and the companies; but corporations have power only as granted by the general assembly; and where companies situated as these are, being parallel and competing, claim that authority to consolidate

has been granted to them, they must be able to point to words in the statute which admit of no other reasonable construction, for it will not be assumed that the law-making power has authorized the creation of a monopoly so detrimental to the public interest. But the statute contains no such words."

This decision, in our view, states the law correctly, and the statute only authorizes the consolidation of two lines of railway where the lines thus consolidated will form one continuous railroad. As the Atchison and Nebraska City railroad and the Atchison, Lincoln, and Columbus railroad, when consolidated, would form one continuous line, the statute authorized such consolidation; that part of the line, however, in Nebraska is held by said company as a Nebraska corporation, while that in Kansas is held as a Kansas corporation, under the laws of that state.

Section 94, chapter 16, of the Compiled Statutes, provides that "any railroad company heretofore or hereafter incorporated may, at any time, by means of subscription to the capital stock of any other company, or otherwise, aid such company in the construction of its railroad for the purpose of forming a connection of said last-mentioned road with the road owned by the company furnishing such aid; or any railroad company existing in pursuance of law may lease or purchase any part or all of any railroad constructed by any other company, if said company's lines of said road are continuous or connected as aforesaid, upon such terms and conditions as may be agreed on between said companies respectively; or any two or more railroad companies whose lines are so connected may enter into an arrangement for their common benefit consistent with and calculated to promote the objects for which they are created; provided, that no such aid shall be furnished, nor any purchase, lease, or arrangement perfected, until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place and in manner as they shall designate, and the holders of at least two thirds of the stock of such company, represented at such meeting, either in person or by proxy, and voting thereat, shall have assented thereto."

It will be observed that the authority of one company to aid another in the construction of its railroad is for the purpose of making connection between the two roads. That is, the two roads when connected must form a continuous line. It will also be observed that the right of any company to lease

or purchase any part or all of any railroad constructed by any other company is limited to cases where the purchasing company's line and the road purchased are continuous or connected. If the line purchased or leased does not form a connected or continuous line with the road owned by the company purchasing or leasing the same, there is no power given by statute to either make a lease of said railway or hold under the same. This was the state of the law in 1871, when these companies were organized and consolidated, and the statute has remained in that form until the present time.

Section 2, article 2, chapter 72, of the Compiled Statutes, provides "that it shall be competent and lawful for any railroad company heretofore incorporated or organized, or which may be hereafter incorporated or organized, under the laws of an adjoining state, and which shall have extended its railroad into this state, or have become a corporation of this state under the laws thereof, to mortgage, lease, or sell that part of its railroad, and the property, rights, privileges, and franchises connected therewith, situated in this state, to any railroad in this state, and the railroad company making such purchase shall thereupon become vested with all the property, rights, privileges, and franchises of the company making such sale, and pertaining to the said railroad so sold, and shall be authorized to locate, construct, and complete, maintain, and operate the railroad thus purchased, and may receive, hold, and convey all the municipal aid, endowments, and property of any kind whatsoever, upon complying with the terms and conditions upon which the same were to be had, as fully and to the same extent as the railroad company making such sale could have done, had no such sale been made."

This act was passed in 1881, and the section only applies to corporations of an adjoining state which shall have extended their railroad into this state and become corporations under the laws thereof, to mortgage, lease, or sell that part of their railroad situated within this state to a railroad company within the state. This section does not repeal sections 89 and 94 of chapter 16 of the Compiled Statutes. Nor does it authorize a railway to lease its entire line, that out of the state as well as that within. That statute therefore does not apply to nor aid this case. So far as the power to lease is concerned, requiring the lines to be continuous, chapter 58 of the Session Laws of 1887 contains certain provisions as to the power to purchase or lease railways, which need not be noticed, as it

has no application to the case at bar. The second section of the act contains a provision for the ratification of prior leases and consolidations, which at the most can only legalize acts done in good faith where there was a want of full power to perform the same, but does not apply to cases where leases were made or consolidations effected against the inhibitions of the statute. The lease of the defendant therefore is not validated or aided by that statute.

To justify the defendant in leasing its line to the Burlington and Missouri Railroad Company, it must be able to point to the exact statute granting such authority, which it has failed to do: *Penn. Co. v. St. Louis, Alton, and Terre Haute R. R.*, 118 U. S. 294. In the opinion of the majority of the court in that case, it is said: "We think it may be stated, as the just result of these cases, and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company for a long period of time its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchises, and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter." This, in our view, is a correct statement of the law.

In *Thomas v. Railroad Company*, 101 U. S. 71, a railroad company in New Jersey had leased its road, franchises, and property for a period of twenty years, giving the lessee complete control thereof, and received as rent one half the gross sum collected by the lessee from the operation of the road. The decision turned upon the power of the company under its corporate authority to make the lease. The lessee insisted that a corporation may, as at common law, do an act which is not either expressly or impliedly prohibited by its charter. To this the court responded: "We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is

expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

The doctrine as above stated meets our hearty approval. If the allegations of the information are true,—and they are to be so considered on demurrer to the information,—the defendant induced the people along its line, from the Kansas border to the city of Lincoln, to grant liberal aid for the construction of the road. Every piece of land subject to taxation in the counties along the line of said road is practically mortgaged by the issuing of bonds to aid in building it. The interest has presumably been paid on these bonds to the present time; many of the settlers along such road when the bonds were issued were pioneers, struggling with the hardships, poverty, privations, and difficulties incident to a new country. To many of them, no doubt, the taxes necessary to meet the interest and amount required for the sinking fund have been a burden, and by every one the tax was voted to aid in constructing and operating an independent line of railway. That was the contract of the parties, and the state would be derelict in its duties if it did not compel an observance on the part of the defendant of its duties. The defendant, however, having obtained this bonus, sought to surrender all its powers, rights and franchises to another corporation for the period of 999 years. So far as the defendant is concerned, it has ceased to operate a railroad, and the charge of misuser and non-user plainly appears on the face of the record.

It is not the policy of the law to allow a railroad company, organized as an independent line, to procure aid on every hand in that character, and after the road is completed sell out to the highest bidder. Honorable and fair dealing are as essential in the dealings of a railroad corporation with individuals and the public in the construction and operation of its road as between individuals in the ordinary affairs of life. A railway company cannot be permitted to act in bad faith with those from whom it has received aid upon certain conditions. Having received the consideration, it must perform on its part, and the parties are entitled to a literal compliance. And while a lessee in a proper case, or assignee or purchaser, will take a road burdened with the conditions, obligations, and duties assumed by the original corporation, yet there can be no such transfer by lease, assignment, or sale without express statutory authority, and as we find no such authority, and the defend-

ant has been guilty of misuser and non-user of its franchises, they are subject to forfeiture.

We have placed the decision entirely upon the statute, but there are other grounds which will now be noticed.

Section 3, article 11, of the constitution, provides that "no railroad corporation or telegraph company shall consolidate its stock, property, franchises, or earnings, in whole or in part, with any other railroad corporation or telegraph company owning a parallel or competing line, and in no case shall any consolidation take place except upon public notice of at least sixty days to all stockholders, in such manner as may be provided by law."

Section 5 also provides that "no railroad corporation shall issue any stock or bonds except for money, labor, or property actually received and applied to the purposes for which such corporation was created, and all stock, dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void. The capital stock of railroad corporations shall not be increased for any purpose, except after public notice for sixty days, in such manner as may be provided by law."

This is an absolute prohibition against a railroad corporation consolidating its stock, property, franchises, or earnings, in whole or in part, with any other railroad corporation owning a parallel or competing line. The word "consolidate" is here used in the sense of join or unite. The constitutional convention aimed at practical results. The character of the title of the parties operating a railway is of but little moment to the general public, while the requirement that different roads shall continue to be competing lines, as when they were constructed, is of the utmost importance to all. The law cannot be evaded, therefore, by substituting a lease for a deed of conveyance. It will be observed that there are two classes of railroads to which the prohibition applies, viz., parallel and competing. As to what are parallel roads is not now before the court; but that the defendant was a competing road is alleged in the information, admitted by the demurrer, and clearly shown from the record. It was therefore clearly within the inhibition of the constitution, and neither its stock, franchises, or earnings can be joined to any other competing line. The prohibition against the joinder of these prohibits the leasing of such roads.

Competition can only be had by securing competing lines,

and thus prevent a monopoly in the operation of the roads, and this it did by forbidding the purchase or control of parallel or competing roads under the same management. As the defendant was organized prior to the adoption of the constitution, it is claimed that it would not be subject to this restriction. There is no force, however, in this objection. The corporation was organized to build and operate a railroad from the Kansas line to Lincoln and Columbus. That was the very purpose of its being. It had no authority to lease its road under the statute, and was therefore deprived of no right, and the constitutional inhibition applies to it.

The attorneys for the defendant contend that section 5, article 11, of the constitution, applies more particularly to stockholders. It has a much broader scope, however. It was intended to restrict the issue of stock and bonds to the actual consideration received. One of the objects of the provision was to enable all parties to know the actual cost of all railroads within the state, so that the legislature, in providing for taxing them and for regulating the charges for transportation of persons and property may be enabled to do so advisedly, and pass laws which shall be just alike to the railway companies, the public, and individuals. In any view of the case, therefore, the defendant's franchises are subject to forfeiture.

The court will not, in the first instance, however, declare a forfeiture, but the lease will be declared void.

The demurrer is overruled. The defendant has leave to answer by the first day of the next term of court.

FORFEITURE OF CORPORATE FRANCHISES. — As commonly expressed, the franchises of a corporation may be forfeited for misuser or non-user, and the corporation dissolved: 1 Bla. Com. *485; 2 Kent's Com. *305; Angell and Ames on Corporations, sec. 774; Boone on Corporations, sec. 203; Wood's Field on Corporations, sec. 441; *Eastern Archipelago Co. v. Regina*, 2 El. & B. 856; 22 Eng. L. & Eq. 328; *Terrett v. Taylor*, 9 Cranch, 43, 51; *Dartmouth College v. Woodward*, 4 Wheat. 659; *Paschall v. Whitsett*, 11 Ala. 472; *State Bank v. State*, 1 Blackf. 267, 275; *State v. New Orleans Gas Light etc. Co.*, 2 Rob. (La.) 529; 532; *Chesapeake etc. Canal Co. v. Baltimore etc. R. R.*, 4 Gill & J. 1, 121; *Washington etc. Turnpike Co. v. State*, 19 Md. 239; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49; 35 Am. Dec. 292; *State v. Commercial Bank of Manchester*, 13 Smedes & M. 569; 53 Am. Dec. 106; *State v. Council Bluffs etc. Ferry Co.*, 11 Neb. 354; *Slee v. Bloom*, 5 Johns. Ch. 366; *People v. Bank of Hudson*, 6 Cow. 217; *Bissell v. Michigan etc. R. R.*, 22 N. Y. 268; *Trustees of McIntire Poor School v. Zanesville Canal etc. Co.*, 9 Ohio, 203, 289; 34 Am. Dec. 440.

There are four classes of cases in which the question of forfeiture may

arise: 1. The charter may provide that, for the failure of the corporation to observe certain express provisions or conditions, the franchises granted should be forfeited, and the corporation dissolved; or 2. The charter may simply impose certain express obligations upon the corporation, without providing in so many words that a violation thereof shall be a cause of forfeiture; or 3. There may be implied conditions resting upon the corporation by virtue of the acceptance of the charter; or 4. The corporation may have violated some general statute or rule of the common law. With regard to the first of these classes, it is of course evident that a cause of forfeiture results if the corporation does not comply with the conditions imposed: See *State v. Real Estate Bank*, 5 Ark. 595, 601; 41 Am. Dec. 109, 114. The questions would necessarily be one of interpretation of the particular provision, and one of fact in determining whether or not the provision had been violated by the corporation. In what way the forfeiture might be declared is another matter. More difficulty arises with reference to the other classes.

FRANCHISES ARE SUBJECT TO FORFEITURE FOR WILLFUL MISUSER OR NON-USER. — It is said to be a tacit condition annexed to every act of incorporation that the franchises are subject to forfeiture and the corporation dissolved for willful misuser or non-user in regard to matters which go to the essence of the contract between the corporation and the state: Angell and Ames on Corporations, sec. 774; Boone on Corporations, sec. 203; 2 Morawetz on Corporations, sec. 1014; Taylor on Corporations, sec. 457; 2 Waterman on Corporations, sec. 427; Wood's Field on Corporations, sec. 441; note to *Folger v. Columbian Ins. Co.*, 96 Am. Dec. 757; *Rex v. City of London* (Sir James Smith's case), 1 Show. 274, 280; Skin. 310; 4 Mod. 52, 58; 12 Id. 17, 18; *Rex v. Pasmore*, 3 Term Rep. 199, 246; *City of London v. Vanacre*, 1 Ld. Rayn. 496, 498; 12 Mod. 270, 271; *Rex v. Grosvenor*, 7 Id. 198, 199; *Eastern Archipelago Co. v. Regina*, 2 El. & B. 856; 22 Eng. L. & Eq. 328; *Terrett v. Taylor*, 9 Cranch, 43, 51; *Mumma v. Potomac Co.*, 8 Pet. 281; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; *State v. Tombeckbee Bank*, 2 Stew. 30, 37; *Darnell v. State*, 48 Ark. 321; *State Bank v. State*, 1 Blackf. 267, 275; *State v. New Orleans Gas Light etc. Co.*, 2 Rob. (La.) 529, 532; *Chesapeake etc. Canal Co. v. Baltimore etc. R. R.*, 4 Gill & J. 1, 121; *Washington etc. Turnpike Co. v. State*, 19 Md. 239; *State v. Minnesota Cent. R'y*, 36 Minn. 246; *State v. Commercial Bank of Manchester*, 13 Smedes & M. 569; 53 Am. Dec. 106; *State v. Council Bluffs etc. Ferry Co.*, 11 Neb. 354; *State v. Farmers' College*, 32 Ohio St. 487, 489; *Chinlechemouche Lumber etc. Co. v. Commonwealth*, 100 Pa. St. 438; and a provision in a charter that the corporation shall not be dissolved previous to the expiration of its charter, until all its debts are paid, does not protect the corporation from dissolution for a violation of the charter, the provision being intended merely to prevent the corporation from dissolving itself before the expiration of its charter without paying its debts: *State Bank v. State*, 1 Blackf. 267. So a constitutional provision "that no man's property shall be taken for public use without the consent of his representatives," does not prohibit a judgment of seizure of the franchises of a corporation for a violation of the charter, let the effect upon private property be what it may: Id. And a state legislature is authorized, in the proper exercise of the police power, to adopt such necessary legislation and regulations as will effectually protect the community from losses and injury incident to a public business conducted by a corporation, where such business has become hazardous, and will probably result in financial distress to those who, in ignorance of the condition of the corporation, deal with it; and therefore the legislature may pass a law providing for the dissolution of ex-

iating insurance companies, on judicial inquiry, when the auditor of the state, upon examination, shall be of the opinion that their condition is such as to render their further continuance in business hazardous to those insured therein: *Ward v. Farwell*, 97 Ill. 594.

It is sometimes said that the franchises of a corporation may be forfeited for the failure to comply with conditions precedent to its organization; but properly speaking, the forfeiture of a franchise presupposes a franchise validly existing, and consequently there can be no forfeiture except for the breach of a condition subsequent. "By the failure to perform conditions precedent, a right may be defeated or prevented from vesting, but it is not forfeited except for the non-performance of conditions subsequent": *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 613, per Sharkey, C. J. And on the same principle, proceedings to vacate the charter of a corporation for non-user cannot be sustained, where the non-user complained of was simply an omission on the part of the corporators named in the act of incorporation to organize under it: *State v. Simonton*, 78 N. C. 57.

COURTS PROCEED WITH CAUTION IN PROCEEDINGS TO DECLARE FORFEITURES. — It is not every excess of power, nor every omission of duty, that is a cause of forfeiture of the charter of a corporation: *Harris v. Mississippi Valley etc. R. R.*, 51 Miss. 602; *State v. Royalton etc. Turnpike Co.*, 11 Vt. 431, 432; *Chesapeake etc. Canal Co. v. Baltimore etc. R. R.*, 4 Gill & J. 1, 107; *Commissioners for Frederick Female Seminary v. State*, 9 Id. 379, 404. Courts act with extreme caution in proceedings which have for their object the forfeiture of corporate franchises; and a forfeiture will not be declared except under the express provisions of the charter, or for a plain misuse or non-use of powers, by which the corporation fails to fulfill the design and purpose of its organization: *State v. Farmer's College*, 32 Ohio St. 487, 489; *State v. Commercial Bank of Cincinnati*, 10 Ohio, 535; *Harris v. Mississippi Valley etc. R. R.*, 51 Miss. 602; *Chicago City R'y v. People*, 73 Ill. 541; *State v. Real Estate Bank*, 5 Ark. 595, 602; 41 Am. Dec. 109, 114; *State v. Société Républicaine*, 9 Mo. App. 114; and in order that the courts may proceed with the requisite caution, it is necessary that the information should state with precision every fact which constitutes the abuse of the franchises complained of: *Harris v. Mississippi Valley etc. R. R.*, 51 Miss. 602, 608; and that the allegations which are relied upon to establish a judgment of forfeiture should be supported by such evidence as leaves no doubt of their truth: *People v. Oakland County Bank*, 1 Doug. (Mich.) 282, 284.

If a corporation is found guilty of acts or omissions which are expressly declared to be a cause of forfeiture of its franchises, plainly a court has no discretion to refuse such a judgment: *State v. Oberlin Building and Loan Association*, 35 Ohio St. 258; *State v. Pennsylvania etc. Canal Co.*, 23 Id. 121; *State v. Minnesota Central R'y*, 36 Minn. 246, 258; *People v. Fishkill etc. Plank Road Co.*, 27 Barb. 445; *People v. Northern R. R.*, 53 Id. 98; but in other cases the court is vested with a discretion, and may refuse a judgment of ouster, if, in its opinion, the interests of the public do not require such a judgment: *State v. Oberlin Building and Loan Association*, 35 Ohio St. 258; *State v. People's Mut. Ben. Ass'n*, 42 Id. 579; *State v. Minnesota Central R'y*, 36 Minn. 246, 258; *State v. Crawfordsville etc. Turnpike Co.*, 102 Ind. 283, 289; *State v. Essex Bank*, 8 Vt. 489; and where a statute provides that instead of a judgment of ouster from a franchise for an abuse thereof, unless the court is of the opinion that the public good demands such judgment, a fine may be assessed, it was held that where the omission of duty was of minor importance, the alternative of a fine may properly be considered, but when the

non-performance was of the very thing the performance of which was the purpose and object for which the company was instituted, then a judgment of ouster should be imposed: *People v. Kankakee Improvement Co.*, 103 Ill. 491. If, however, a cause of forfeiture exists, the hardship upon the corporation of enforcing it is no reason why it should not be enforced: *Id.* 491, 510. In those jurisdictions where the attorney-general is first required to obtain leave of court to file an information against a corporation, such a proceeding also necessarily implies that the granting of leave is in the sound discretion of the court to which application is made: *Attorney-General v. Erie etc. R. R.*, 55 Mich. 15, 21; *People v. North Chicago R'y*, 88 Ill. 537.

SUBSTANTIAL PERFORMANCE OF CONDITIONS IS ALL THAT IS REQUIRED. — Again, a substantial performance of conditions imposed upon a corporation is all that is required: *People v. Kingston etc. Turnpike Road Co.*, 23 Wend. 193; 35 Am. Dec. 551; *People v. Fishkill etc. Plank Road Co.*, 27 Barb. 445; *People v. Williamsburgh Turnpike Road etc. Co.*, 47 N. Y. 586; *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 623; *State v. Wood*, 84 Mo. 378; *State v. Farmer's College*, 32 Ohio St. 487; *Chicago City R'y Co. v. Story*, 73 Ill. 541; *Harris v. Mississippi Valley etc. R. R.*, 51 Miss. 602, 609. "The law requires but a substantial compliance with conditions, and it is not rigid in enforcing forfeitures; yet if the utility of the corporation be lessened, or if an injury result to the public by an act which it is not authorized to do, it is a forfeiture": *Commercial Bank of Natchez v. State*, *supra*. "Slight deviations from the provisions of a charter would not necessarily be either an abuse or a misuser of it, and would therefore be no ground for its annulment, although it would be competent for the crown, by apt words, to make the continuance of the charter conditional upon the strict and literal performance of them": *Eastern Archipelago Co. v. Regina*, 2 El. & B. 856, 870; 22 Eng. L. & Eq. 328, 338, per Martin, B. Yet, while slight deviations from the provisions of a charter should not occasion a forfeiture, if the grand, leading conditions and restrictions have been violated, there can be no question that the franchises are thereby forfeited: *State Bank v. State*, 1 Blackf. 267, 275. This rule that a substantial compliance with the conditions of a grant of corporate franchises is all that is necessary should be applied with caution. Thus in the case of *State v. Wood*, 84 Mo. 378, it was held that where a corporation was required by statute to have paid up one half its capital stock "in lawful money of the United States," it was sufficient if the corporation received property in payment the market value of which was greater than the par value of the stock, — a decision of questionable correctness.

PUBLIC MUST HAVE INTEREST IN ACTS OR OMISSIONS. — Furthermore, only such acts or omissions are a cause of forfeiture as concern matters which are of the essence of the contract between the state and the corporation, or in other words, in which the public have an interest: *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 617; *Attorney-General v. Petersburg etc. R. R.*, 6 Ired. 456, 469; *Harris v. Mississippi Valley etc. R. R.*, 51 Miss. 602, 605; *State v. Council Bluffs etc. Ferry Co.*, 11 Neb. 354, 356; *Thompson v. People*, 23 Wend. 538, 581; *State v. Real Estate Bank*, 5 Ark. 595, 601; 41 Am. Dec. 109, 114; *State v. Minnesota Central R'y*, 36 Minn. 246, 258; *State v. Minnesota Thrasher Mfg. Co.*, Minn. Sup. Ct., March 7, 1889. No cause of forfeiture arises from the violation of provisions of a charter which are simply intended to apply to the internal government of the corporation. Thus in *Commercial Bank of Natchez v. State*, *supra*, Sharkey, C. J., says: "In the construction of charters, a distinction must be observed between those provisions which are intended to apply merely to the internal government of

the corporation, and those which impose positive conditions, restrictions, or duties, in which the public interest is involved. For a violation of the latter a forfeiture occurs, but not so with regard to the former." "The public must have an interest in the act done or omitted to be done," says Sinrall, J., in *Harris v. Mississippi Valley etc. R. R.*, *supra*. "If it is confined exclusively to the corporation, and in no wise affects the community, it should not be considered as of those conditions upon which the grant is made." Nor can a forfeiture be decreed for the violation by a corporation of a mere legal duty, which may be redressed by ordinary process of law: *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109, 118; *Commonwealth v. Allegheny Bridge Co.*, 20 Pa. St. 185. Thus the fact that a banking corporation has failed to pay interest on state bonds is no cause of forfeiture: *State v. Real Estate Bank*, *supra*; and where an act requires the banks in a certain city to settle, and pay in gold and silver, the balances due to one another, if one in whose favor the right exists chooses to waive it, the state cannot complain without showing some injury resulting therefrom to the community: *State v. New Orleans Gas Light etc. Co.*, 2 Rob. (La.) 529.

WILLFUL ABUSE OR IMPROPER NEGLIGENCE IS NECESSARY. — It is a further rule that, to work a forfeiture of the franchises of a corporation, there must be a willful abuse or improper neglect, and something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power: Angell and Ames on Corporations, sec. 776; Boone on Corporations, sec. 203; 2 Morawetz on Corporations, sec. 1028; 2 Waterman on Corporations, sec. 427; Wood's Field on Corporations, sec. 444; *People v. Bristol etc. Turnpike Road Co.*, 23 Wend. 222, 236; *State v. Merchants' Ins. & T. Co.*, 8 Humph. 235; *Harris v. Mississippi Valley etc. R. R.*, 51 Miss. 602; *Attorney-General v. Erie etc. R. R.*, 55 Mich. 15, 22; *Central etc. R. R. v. People*, 5 Col. 39, 46; *State v. Rio Grande R. R.*, 41 Tex. 217; *State v. Pipher*, 28 Kan. 127, 131; *Chesapeake etc. Canal Co. v. Baltimore etc. R. R.*, 4 Gill & J. 1, 107; *State v. Société Républicaine*, 9 Mo. App. 114, 119. "It must be, in some sense or other," says Senator Verplanck in *Thompson v. People*, 23 Wend. 537, 582, "a 'misdemeanor' in violation of the trust"; and see also *State v. Real Estate Bank*, 5 Ark. 595, 601; 41 Am. Dec. 109, 114. Acts of a corporation, therefore, which would otherwise be a cause of forfeiture of its charter, will not be so held when done in good faith: *State v. Consolidation Coal Co.*, 46 Md. 1, 14; and no mere intention or purpose in a corporation to violate its charter can constitute a cause of forfeiture: *Commonwealth v. Pittsburg etc. R. R.*, 53 Pa. St. 26. But willful neglect does not "imply criminality, but must be construed to mean permissive, voluntary neglect": *Washington etc. Turnpike Co. v. State*, 19 Md. 239, 295; nor need the neglect or refusal of a corporation to perform the duties enjoined by the charter proceed from a bad or corrupt motive even, but it is enough if they be designedly omitted: *People v. Kingston etc. Turnpike Road Co.*, 23 Wend. 193; 35 Am. Dec. 551. If, however, a corporation deliberately abandons a salutary rule prescribed by its charter for the benefit of the public, and substitutes another rule for the transaction of its business in violation of the terms of its charter, it is, of course, a sufficient cause of forfeiture: *State v. Commercial Bank of Manchester*, 33 Miss. 474. Where a statute concerning plank-road corporations provides that "no act or omission on the part of any such company, or of its stockholders or officers, shall work a forfeiture of its corporate power or franchises, unless the same was willful and malicious," whatever acts of the company are willful, and done with an intention contrary to its duty and forbidden by its charter, are not waived, while mere negligence,

single acts of non-feasance, or omissions proceeding from inadvertence and without design, are forgiven by the statute: *People v. Fishkill etc. Plank Road Co.*, 27 Barb. 445. The information should allege that the acts complained of were willfully done or designedly omitted by the corporation: *Harris v. Mississippi Valley etc. R. R.*, 51 Miss. 602, 606; *State v. Columbia etc. Turnpike Co.*, 2 Sneed, 254.

It should here be noticed that the corporation is answerable, so far as its franchises are in question, for the misconduct of its governing body in the management of its concerns within their proper sphere: *State Bank v. State*, 1 Blackf. 267; although the mere neglect of an officer to comply with a condition of the act under which a corporation was organized, or even his positive refusal so to do, when such refusal was without the knowledge or consent of the managing body, should not work a forfeiture: *State v. Seneca County Bank*, 5 Ohio St. 171, 173.

A single act of abuse or willful non-feasance may, furthermore, be insisted upon as a ground of forfeiture: *People v. Bristol etc. Turnpike Road Co.*, 23 Wend. 222, 245, 252; *People v. Hillsdale etc. Turnpike Road Co.*, 23 Id. 254; *Commonwealth v. Tenth Massachusetts Turnpike Corp.*, 11 Cush. 171, 177; *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 623; although some cases intimate that the acts or omissions must be repeated or continued: *State v. Pipher*, 28 Kan. 127, 131; *State v. Council Bluffs etc. Ferry Co.*, 11 Neb. 354, 356; *State v. Royalton etc. Turnpike Co.*, 11 Vt. 431, 432.

EFFECT OF IMPOSING PENALTY FOR ACT OR OMISSION. — It has been held that if the charter of a banking corporation imposes a penalty in case of the suspension of specie payments, the legislature, by so providing, indicates an intent that a forfeiture shall not ensue from that cause: *State v. Commercial Bank of Cincinnati*, 10 Ohio, 535; *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109; *State v. Tombeckbee Bank*, 2 Stew. 30; and where a charter imposes on the proprietors of a bridge across navigable waters a penalty for unreasonably neglecting to raise the draw, any neglect of such kind would subject the proprietors to such penalty, but would not operate as a forfeiture of the franchise: *Commonwealth v. Breed*, 4 Pick. 460. So the fact that a corporation has made no publication, as required by its charter, showing the amount of capital, the proportion paid in, and the amount of existing debts, is not to be visited by a forfeiture of its charter, where, for the failure to do so, it is provided that the trustees shall be jointly and severally liable for all the debts of the company then existing, and for all that might be contracted before such report should be made: *Baker v. Backus*, 32 Ill. 79; nor is the fact that one half of the capital stock of a corporation was not paid in, as required by the charter, within one year from the organization of the company, a ground of forfeiture, where the stockholders are made individually liable to creditors for all debts and contracts made by the company, until the whole amount of the capital stock should be paid in, and a certificate thereof filed with and recorded by the county clerk: Id.; nor is the fact that a corporation fails to keep in its office an alphabetical list of its stockholders, showing their residences, number of shares, and amount of stock paid in, as required by the charter, to be visited by a forfeiture, where a pecuniary penalty is provided for such neglect: Id. On the other hand, it is maintained that the mere fixing of a penalty for the doing or omission to do some act does not prevent the state from proceeding to enforce a forfeiture. Thus in *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 618, Chief Justice Sharkey says, with reference to a provision in the charter of a banking corporation, that upon failure to pay its notes on presentation, they should

bear interest at the rate of twelve and a half per cent per annum: "The charter contains no direct authority for suspension, but it is said to be authorized, or at least excused, by that provision which gives to the note-holder a right to demand twelve and a half per cent per annum on notes that the bank refused to pay. This is believed to be a misapprehension of the effect of this provision. It furnishes no implied authority for the suspension of specie payments; it is but an indemnity for the note-holder; it looked to nothing else but the rights of individuals, or, if it did, the design was to compel the bank to do its duty. Viewed in this light, it would be strange reasoning to say that the means employed to coerce the discharge of a duty constitute a good cause for the breach, — that the penalty imposed legalizes the offense. The question of forfeiture is between the state and the bank; the question of interest is between the individual and the bank. If the mere claim of interest, or the right to demand it, will excuse the suspension, it may be continued for an indefinite time, and although the bank might in this way defeat the great object of its creation, a forfeiture could not be enforced." In another case it is also held that although provision is made in the charter of a turnpike corporation for the punishment of the company and its agents if it should neglect to keep its road in good and perfect repair, such provision was intended to apply only to temporary neglect, and did not deprive the state of its sovereign power to annul the grant when its purposes have failed through such neglect: *Washington etc. Turnpike Co. v. State*, 19 Md. 239; and see *People v. Bristol etc. Turnpike Road Co.*, 23 Wend. 222; *People v. Hillsdale etc. Turnpike Road Co.*, 23 Id. 254; *State Bank v. State*, 1 Blackf. 267, 275.

The question of the effect of imposing a penalty is plainly one of legislative intent. If a penalty is imposed for an act or omission, and the charter or statute imposing it does not expressly or by necessary implication deprive the state of the right to proceed for a forfeiture, then, on principle, such proceedings should not be cut off. The reasoning of Mr. Justice Sharkey is forcible and cogent to this effect. Even in *State v. Commercial Bank of Cincinnati*, *supra*, it was admitted that the suspension of specie payments might be continued long enough, and be carried far enough, to work a forfeiture.

FORFEITURE, WHETHER SUBJECT TO EXCUSE. — The question may arise when a cause of forfeiture is shown or admitted, whether the corporation may offer an excuse or atonement therefor. In *People v. Bank of Niagara*, 6 Cow. 96, it was held that where an act under which a bank was incorporated provided that if the company should refuse, on demand, to redeem in specie or other lawful money its bills, notes, or other evidences of debt, it should, on pain of forfeiture of its charter, discontinue and close its banking operations until such time as it should resume the redemption of its paper, it was a sufficient answer to proceedings against the bank for the forfeiture of its charter because of its insolvency, and the closing of its banking operations, that when the information was filed the bank was again doing business and redeeming its paper; but it is otherwise held that where a cause of forfeiture has arisen, mere subsequent good behavior by the corporation will not legally atone therefor: *People v. Hillsdale etc. Turnpike Road Co.*, 23 Wend. 254, 258; *People v. Fishkill etc. Plunk Road Co.*, 27 Barb. 445; nothing but a waiver by the legislature will relieve the corporation. In *People v. Hillsdale etc. Turnpike Road Co.*, *supra*, Cowen, J., in commenting on the case of *People v. Bank of Niagara*, *supra*, says: "When a cause of forfeiture has once arisen, whether from non-feasance or otherwise, no case nor *dictum* can be found that it shall be legally atoned for by subsequent good behavior. The

authority cited turned upon the construction of a statute providing for the particular case of the Niagara Bank stopping payment." It has been further held to be no defense to proceedings against a turnpike corporation, to which the state had granted no exclusive privileges, for its failure to keep its road and bridges in repair, that the state had incorporated another company, was in part managing it and largely profiting by it, and in consequence thereof the revenues of the first company were so far lessened that it could observe its charter no better than it did: *Turnpike Co. v. State*, 3 Wall. 210. If an act or omission is expressly declared to be a cause of forfeiture, obviously no excuse for the forfeiture should be admitted: *People v. Northern R. R.*, 53 Barb. 98.

MISUSER OR NON-USER IN ONE DEPARTMENT OF ENTIRE FRANCHISE is a cause of forfeiture of the whole: *People v. Bristol etc. Turnpike Road Co.*, 23 Wend. 222, 237; *People v. Kankakee Improvement Co.*, 103 Ill. 491; and where a corporation holds a franchise which is entire in its character, as to improve the navigation of a river between certain designated points, but with power to lease a portion of the works, a lessee of such portion will hold subject to the risk of forfeiture of the entire franchise, if the lessor should be guilty of default with respect to the improvement of any other portion of the stream: *People v. Kankakee Improvement Co.*, *supra*. The charter, or other statute, may, however, provide that a forfeiture shall arise with respect to that portion only about which the default occurs: *People v. Jackson etc. Plank Road Co.*, 9 Mich. 285; *State v. St. Paul etc. R. R.*, 35 Id. 222, 224; and a statute, subsequent to the charter of a corporation, and not assented to by the corporation, which subjects the company to a total forfeiture for that which under its charter is a cause of partial forfeiture only, is void as impairing the obligation of a contract: *People v. Jackson etc. Plank Road Co.*, *supra*.

FAILURE TO OBSERVE EXPRESS CONDITIONS. — It has been shown above that if an act or omission is expressly declared to be a cause of forfeiture of the charter of a corporation, a judgment of forfeiture must necessarily follow in accordance with the expressed legislative intent, whatever the act or omission may be. It would seem, notwithstanding, that even in this case there must be willful abuse or improper neglect, unless a contrary intention is manifest. If a duty, however, is simply imposed upon a corporation, without a further provision that its violation shall be a cause of forfeiture, then not only must there have been a willful abuse or an improper neglect, but the act or omission must have been of the essence of the contract between the corporation and the state. In either case, unless the contrary is expressed, a substantial performance only of conditions is required.

In accordance with these principles, if it is provided that if a corporation shall have suspended its ordinary and lawful business for one year, it shall be adjudged to be dissolved, a company incorporated for the purpose of making marine insurances, and of lending money upon bottomry and *respondentia* securities, which has formerly suspended such business for more than a year, is liable to be dissolved, although in the mean time it had attended to the adjustment of losses upon risks previously assumed, and to the business of collecting in and securing the corporate funds: *Ward v. Sea Ins. Co.*, 7 Paige, 294; *Matter of Jackson Marine Ins. Co.*, 4 Sand. Ch. 559. Such a statute is peremptory; no excuse for the forfeiture is admitted: *People v. Northern R. R.*, 53 Barb. 98; and no room is left for any discretion on the part of the court to release judgment of forfeiture, where such fact clearly appears: *State v. Minnesota Central Ry.*, 36 Minn. 246, 258; *State v. Pennsylvania etc. Canal Co.*, 23 Ohio St. 121; *Hart v. Boston etc. R. R.*, 40 Conn. 524; and see

cases cited *supra* under head, "Courts Proceed with Caution in Proceedings to Declare Forfeitures"; but, nevertheless, such a statute is cumulative, and not a substitute for the common-law rule, and therefore, under proper circumstances, a forfeiture may be declared for a suspension for a less period of time: *Bradt v. Benedict*, 17 N. Y. 93. In *Kelsey v. Pfaunder Process Fermentation Co.*, 45 Hun, 10, 19 Abb. N. C. 427, the defendant, a corporation formed for the purpose of manufacturing, using, licensing, and selling certain machines and apparatus, and the process in which the same were used, in order to avoid ruinous competition and litigation with a rival company, entered into an agreement with the latter, by which all the patents of both companies were assigned to a new corporation formed for the purpose, and all future business pooled and the profits divided, in certain proportions, between the two original companies, but the defendant kept up its organization, its officers continued to discharge their duties, and it continued to receive royalties, issue licenses, and prosecuted and defended actions to which it was a party. It was held not to have suspended its ordinary and lawful business, within the meaning of the statute, so as to warrant a judgment of dissolution. Again, the neglect of a corporation for more than one year to pay its debts is sufficient, under a statute so providing, to justify proceedings for dissolution: *Kittredge v. Kellogg Bridge Co.*, 8 Abb. N. C. 168; and if a law requires at least a majority of the directors, and the president or vice-president, treasurer, and secretary of every railroad company entitled to the benefits of a certain act to reside in the state, under penalty of forfeiture of the charter, a failure to comply with the law will result in a judgment of forfeiture: *State v. Southern Pacific R. R.*, 24 Tex. 80; and see *State v. Milwaukee etc R'y*, 45 Wis. 579.

The following cases illustrate when a forfeiture will be adjudged for the violation by a corporation of some obligation expressly imposed, but for which a forfeiture is not specifically provided. If a banking corporation fails within one year from its organization to pay up its entire capital stock as required by the act under which it was incorporated, the charter is liable to forfeiture: *People v. City Bank of Leadville*, 7 Col. 226; or if it violates a provision of its charter that the total amount of debts which the corporation should at any time owe should not exceed double the amount of moneys actually deposited in the bank for safe-keeping: *State Bank v. State*, 1 Blackf. 267, 275; or if it permits its directors to become largely liable to it, without the stockholders having first adopted by-laws limiting and regulating such liabilities, as required by the act under which it was organized: *State v. Seneca County Bank*, 5 Ohio St. 171; or if it violates a restriction in its charter as to the rate of interest or discount it may take: *State v. Commercial Bank of Manchester*, 33 Miss. 474; *Commonwealth v. Commercial Bank of Pennsylvania*, 28 Pa. St. 383; but see *State v. Commercial Bank of Cincinnati*, 10 Ohio, 535; *State v. Urbana etc. Mut. Ins. Co.*, 14 Id. 6. These are all duties which are imposed for the benefit of the public. And for the same reason, a banking corporation incurs the penalty of forfeiture of its corporate franchises if it neglects and refuses to make and transmit a statement of its condition, at certain times, to the state auditor, as required by the act under which it was organized: *State v. Seneca County Bank*, 5 Ohio St. 171; so the charter of a turnpike company will be declared forfeited for its failure to comply with a provision that it "shall annually exhibit to the governor and council a true account of the income or dividend arising from the tolls, with the annual necessary disbursements on said road": *Commonwealth v. Tenth Massachusetts Turnpike Corp.*, 11 Cush. 171, 175; and where a railroad com-

pany was required by its charter to render to the legislature, annually, a fair account of constructing and keeping the road in repair, and the amount of tolls received on the same, in order to enable the legislature to regulate the tolls, a failure to comply with the provision is a cause of forfeiture of the charter: *Attorney-General v. Petersburg etc. R. R.*, 6 Ired. 456; so if a corporation for the improvement of the navigation of certain rivers accepts an amendment to its charter, which provided that certain work should be completed in a certain time, it was held that although the corporation might have declined to accept the amendment, yet having accepted it, the corporation undertook to do what it enjoined, and a non-compliance with the requirement was a cause of forfeiture of the franchise: *People v. Kankakee River Improvement Co.*, 103 Ill. 491, 507. It is also a matter in which the public are interested that a turnpike or plank-road company should substantially comply with the requirements of its act of incorporation as to the manner of constructing its road, and if it does not, a cause of forfeiture of its franchises exists: *People v. Kingston etc. Turnpike Road Co.*, 23 Wend. 193, 205; 35 Am. Dec. 551; *People v. Waterford etc. Turnpike Co.*, 2 Keyes, 327, 330; 3 Abb. App. 580, 585; *People v. Fishkill etc. Plank Road Co.*, 27 Barb. 445; *Darnell v. State*, 48 Ark. 321, 324; although in some of these cases, a statute also provided for proceedings for a forfeiture. On the other hand, if a provision is inserted in a charter merely to regulate the internal management of the corporation, a violation will not occasion a forfeiture. Thus if the charter of a corporation provides that, "should any stockholder refuse or fail to pay any installment on his stock when called for, the company shall sell said stock, on giving thirty days' notice in some gazette, on account of and at the risk of the stockholders," the power to sell is for the benefit of the corporation only, and therefore a failure to sell is no cause of forfeiture: *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 615; and on the same principle, a failure to comply with a provision in the charter of a company requiring the president and directors to declare semi-annually such dividends of the net profits as they may deem advisable, is no cause of forfeiture: *Attorney-General v. Petersburg etc. R. R.*, 6 Ired. 456, 474; and if a condition is otherwise immaterial, as far as the public are concerned, no forfeiture will be declared for a failure to obey it: *Harris v. Mississippi Valley etc. R. R.*, 51 Miss. 602.

FAILURE TO OBSERVE IMPLIED CONDITIONS.—As heretofore stated, the question of forfeiture may arise concerning implied obligations or conditions resting upon a corporation. If a corporation does what it is impliedly understood it shall not do, or fails to do what it is tacitly understood it shall do, and the public are interested in the non-performance or performance of these obligations, and the acts or omissions are willful or designed, then there is a misuser or non-user, for which the franchises of the corporation may be forfeited. Thus it is a cause of forfeiture if an insurance company undertakes to carry on banking operations without authority: *People v. Utica Ins. Co.*, 15 Johns. 358; 8 Am. Dec. 243; or if the stock of a banking corporation is withdrawn under the form of loans upon private security to the stockholders, with intent to reduce the effective capital below the amount required by the charter: *State v. Essex Bank*, 8 Vt. 489; or if a banking corporation knowingly, and with a fraudulent intent, issues more paper than it can redeem: *State Bank v. State*, 1 Blackf. 267; or if an insurance company takes risks, and accepts premiums, when there is no probability of its ever being able to pay its losses: *Ward v. Farnell*, 97 Ill. 594; but it is no cause of forfeiture

of a charter granted by one state that the corporation has obtained a charter from another state: *Commonwealth v. Pittsburg etc. R. R.*, 58 Pa. St. 26.

Again, it is a cause of forfeiture if a railroad company fails to construct the line of road named in its charter, but condemns private property and constructs a road wholly unsuited to the wants of the public, and for the benefit only of coal mines owned and operated by the principal corporators and stockholders: *State v. Railway Co.*, 40 Ohio St. 504; or, it seems, if a corporation, established for the purpose of supplying a village with water, should act capriciously and oppressively, by furnishing some houses and lots, and refusing a supply to others: *Lumbard v. Stearns*, 4 Cush. 60; or if a railroad company should suspend its public duty of maintaining and operating its road, although it also possesses and continues to exercise other franchises, subordinate and secondary to its principal franchises and business: *State v. Minnesota Cent. R'y*, 36 Minn. 246, 258; or, it has been held, if a corporation does not keep its principal place of business, its records, and the residence of its principal officers within the state of its creation, to an extent necessary to the fullest jurisdiction and visitatorial power of the state and of its courts: *State v. Milwaukee etc. R'y*, 45 Wis. 579; but an insurance company does not forfeit its charter by refusing to insure against extrahazardous risks: *State v. Urbana etc. Ins. Co.*, 14 Ohio, 6; nor will the charter of a railroad company be forfeited because it ceases to run regular passenger trains over a branch road, when there is not sufficient passenger business at any rate of toll or fare to pay the expenses of running them: *Commonwealth v. Fitchburg R. R.*, 12 Gray, 180, 188.

It is also a duty which a corporation, chartered to build a turnpike or plank road, assumes towards the public to keep its road in a proper state of repair for the use of the public; and if it fails to do so, its franchises may be forfeited: *People v. Plymouth Plank Road Co.*, 32 Mich. 248; *Washington etc. Turnpike Co. v. State*, 19 Md. 239, 295; but to warrant a forfeiture for this reason, the failure to repair must be such as to render the road dangerous or highly inconvenient for travel: *People v. Williamsburgh Turnpike Road etc. Co.*, 47 N. Y. 586, 596; *People v. Jackson etc. Plank Road Co.*, 9 Mich. 285; and, it is held, must have continued an unreasonable length of time: *People v. Jackson etc. Plank Road Co.*, *supra*. As to the effect of imposing a penalty for a failure to repair, see *Washington etc. Turnpike Co. v. State*, 19 Md. 239; *People v. Bristol etc. Turnpike Road Co.*, 23 Wend. 222, discussed above. The public, it is held, are not limited to the remedy of having the gates thrown open, but may proceed for a forfeiture of the franchises: *People v. Bristol etc. Turnpike Road Co.*, *supra*; *People v. Hillsdale etc. Turnpike Road Co.*, 23 Wend. 254. And when a cause of forfeiture for a failure to repair has arisen, subsequent repairs, or proceedings taken and perfected for abandoning the portion of the road out of repair, will not cure the difficulty or atone for the failure: *People v. Hillsdale etc. Turnpike Road Co.*, 23 Id. 254, 258; *People v. Fishkill etc. Plank Road Co.*, 27 Barb. 445.

SUSPENSION OF SPECIE PAYMENTS BY BANKS. — The duty of a banking corporation to redeem its notes in specie, also, is a condition essentially imposed upon it, and for a permanent or continued failure to do so, the charter may be forfeited, and the corporation dissolved: *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 618; *Planters' Bank v. State*, 7 Id. 163; *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109; *State v. Bank of South Carolina*, 1 Spear, 433; *State v. New Orleans Gas Light etc. Co.*, 2 Rob. (La.) 529, 533; especially should this be true where the bank continues to make large dividends of profits: *State Bank v. State*, 1 Blackf. 267; although it has been

held no cause of forfeiture for a banking corporation to buy up its own notes at a discount: *Attorney-General v. Bank of Niagara*, Hopk. Ch. 354, 362. A mere temporary suspension, however, if not willful, is no cause of forfeiture: *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 621; *State v. Real Estate Bank*, 5 Ark. 595, 601; 41 Am. Dec. 109, 114; *State Bank v. State*, 1 Blackf. 267; but, on principle, a single instance of willful and obstinate refusal to pay specie should subject the charter to forfeiture: See *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 623; *State v. New Orleans Gas Light etc. Co.*, 2 Rob. (La.) 529, 533.

As heretofore noticed, it is held by some authorities that if the charter of a banking corporation provides a penalty by way of a certain amount of damages or rate of interest to the holders of the notes in case of the suspension of specie payments, the legislative intent is thereby indicated that there shall be no forfeiture from a mere suspension: *State v. Commercial Bank of Cincinnati*, 10 Ohio, 535; *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109; *State v. Tombeckee Bank*, 2 Stew. 30; although even here it is said that the suspension might be continued long enough, and be carried far enough, notwithstanding, to work a forfeiture: *State v. Commercial Bank of Cincinnati*, 10 Ohio, 535, 539. It is, however, held, with better reason, that such a provision does not prevent the state from proceeding to declare a forfeiture: *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 618, quoted *supra*.

ABANDONMENT OF BUSINESS, TRANSFER OF ASSETS, AND INSOLVENCY. — It has been seen that if a corporation neglects the performance of any duty or obligation, which it has assumed for the benefit of the public, its franchises may be forfeited therefor. All corporations, however, are under no positive obligation to the state to carry on the business for which they were formed. Ordinary private business corporations may at any time put an end to their transactions, in whole or in part, and voluntarily wind up their affairs. Their franchise of acting in a corporate capacity is merely permissive, and not an obligation. In these cases, consequently, a forfeiture for non-user of the franchises cannot be based upon a neglect of duty on the part of the company: 2 Morawetz on Corporations, sec. 1025; *People v. Bristol etc. Turnpike Road Co.*, 23 Wend. 222, 237, per Cowen, J.; *People v. Bank of Hudson*, 6 Cow. 217, 219; *Chesapeake etc. Canal Co. v. Baltimore etc. R. R.*, 4 Gill & J. 1, 107, per Buchanan, C. J. The fact, therefore, that an ordinary business corporation has suspended operations for a time, is not enough to warrant a judgment of dissolution, for it may have been a prudent and necessary measure: *People v. Bank of Hudson*, 6 Cow. 217, 219; *State v. Commercial Bank of Manchester*, 13 Smedes & M. 569, 578; 53 Am. Dec. 106, 108. But the condition of a corporation may be such that it has no right to continue its business, and the state may then dissolve it, and end its franchises. Thus a corporation may be dissolved where it transfers all its property, abandons its corporate franchises, and wholly ceases to do business: *State v. Seneca County Bank*, 5 Ohio St. 171; *State v. Pipher*, 28 Kan. 127; *State v. Commercial Bank of Manchester*, 33 Miss. 474. Of course, it may be expressly provided that if a corporation suspends its business for a specified time it shall be dissolved: See *Ward v. Sea Ins. Co.*, 7 Paige, 294; *Matter of Jackson Marine Ins. Co.*, 4 Sand. Ch. 559; in which case the statute is peremptory, and the court has no discretion to refuse to dissolve the corporation if the fact clearly appears: *People v. Northern R. R.*, 53 Barb. 98; *State v. Minnesota Central R'y*, 36 Minn. 246, 258; *State v. Pennsylvania etc. Canal Co.*, 23 Ohio St. 121; and hence it would make no difference that the abandonment by a corporation of its business had not been of free choice, but

compelled by legal proceedings and other causes, which it could not successfully resist: *Hart v. Boston etc. R. R.*, 40 Conn. 524; but such a statute is cumulative, and not a substitute for the general rule of the law, and therefore a corporation may be dissolved, if by a suspension of its business for a less period of time it has lost all power to continue or resume operations: *Bradt v. Benedict*, 17 N. Y. 93.

If, also, a corporation should make a general assignment, or an assignment of so much of its property, for the benefit of its creditors, as to render itself incapable of continuing business, it is a good cause for a dissolution of the corporation, and a forfeiture of its franchises: *People v. Bank of Hudson*, 6 Cow. 217; *State v. Commercial Bank of Manchester*, 13 Smedes & M. 569; 53 Am. Dec. 106; *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109; although the transfer must be a binding one to produce this result: See *State v. Southern Pacific R. R.*, 24 Tex. 80. And if a banking corporation should sell its franchises without authority, that is a cause of forfeiture: *State v. Commercial Bank of Manchester*, 33 Miss. 474; or should permit others to intrude upon and usurp its franchises: *Id.*; or if a turnpike corporation should sell a portion of its road without authority: *State v. Pawtuxet Turnpike Co.*, 8 R. I. 521; 94 Am. Dec. 123; although a railroad company does not forfeit its corporate franchises by a transfer of its road, pursuant to an act the terms of which contemplate that the corporation shall continue to exist: *State v. St. Paul etc. R. R.*, 35 Minn. 222.

Insolvency alone is not sufficient to warrant a dissolution of a corporation. It must appear that the corporation has lost its power to continue business: *People v. Washington etc. Bank*, 6 Cow. 212; *Bradt v. Benedict*, 17 N. Y. 93; *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405. Undoubtedly, if a corporation is in such a financial condition that it cannot continue its operations with safety to the public, the state may dissolve it: See *Ward v. Farwell*, 97 Ill. 594; *State Bank v. State*, 1 Blackf. 267.

Failure to elect managing officers, merely, should plainly not be enough to justify the dissolution of a corporation. Ordinarily, this would not affect the power of the corporation to continue business, the old officers continuing to hold and to perform the duties of the office. If, however, such neglect should, in peculiar cases, end the power of the corporation to continue or resume operations, then, it seems, there would be a ground for a dissolution: See *Stee v. Bloom*, 5 Johns. Ch. 366; *State v. Commercial Bank of Manchester*, 33 Miss. 474; *State v. Trustees of Vincennes University*, 5 Ind. 77; also *Pearce v. Olney*, 20 Conn. 544; *Russell v. McLellan*, 14 Pick. 63; *Boston Glass Manufactory v. Langdon*, 24 Id. 49; 35 Am. Dec. 292; *Cahill v. Kalamazoo Mutual Ins. Co.*, 2 Doug. (Mich.) 124; 43 Am. Dec. 457; *Harris v. Mississippi Valley etc. R. R.*, 51 Miss. 602; *Lehigh Bridge Co. v. Lehigh Coal etc. Co.*, 4 Rawle, 9; 26 Am. Dec. 111; *Commonwealth v. Cullen*, 13 Pa. St. 133; 53 Am. Dec. 450.

ACTS ILLEGAL BY GENERAL LAW. — "TRUSTS." — If a corporation should violate some general statute or rule of the common law, which applies alike to individuals and to corporations, then, it seems, the state may forfeit its franchises and adjudge its dissolution, equally as in the case where it fails to obey the express or implied conditions of its charter, or the provisions of some statute directed against it, imposed for the benefit of the public. Thus if a banking corporation embezzles sums of money deposited with it for safe-keeping, its charter should be declared forfeited: *State Bank v. State*, 1 Blackf. 267; although, it is true, this act is in violation of at least the implied conditions of its charter; and it is also a sufficient cause of forfeiture,

if a corporation agrees to pay and pays all over a certain sum appropriated for it by the legislature to one who assists in obtaining the appropriation: *People v. Dispensary etc. Soc.*, 7 Lans. 304; there being an illegal contract, and an unauthorized diversion of the funds appropriated.

In this connection is also presented the question of the validity and effect upon corporate franchises of those combinations of producers for the purpose of regulating prices, which are popularly known as "trusts." A combination of such a character may of course be entered into by individuals, without a corporate organization, as well as by corporations; or a corporation may be formed for the very object of regulating prices. If such a combination is illegal, because prohibited by the common law or by statute, then, it seems, so far as corporations are concerned, the state may, in proper proceedings, declare the franchises of the corporations forfeited and the corporations dissolved; and the existence of a corporation organized for such an illegal purpose may likewise be ended. In the first of these cases two principal questions would be presented: Is the combination illegal? and assuming that it is, Can corporate bodies enter into it? In the second case, the question involved would be, Is the purpose illegal?

These questions have as yet received no satisfactory solution; and what is more unfortunate, they have assumed a political aspect. Professor Dwight, in a learned article in 3 Political Science Quarterly, 592, reaches the conclusion that "trusts" are not unlawful, and furthermore that neither a state nor Congress has the power to pass preventive legislation. In *People v. North River Sugar Refining Co.*, 19 N. Y. St. Rep. 853, decided by the supreme court, circuit New York County, January 9, 1889, an action in the nature of a *quo warranto* was brought by the attorney-general of the state of New York to dissolve the defendant, a corporation organized under the laws of the state for the purpose of refining sugar, on the grounds that it had abused its powers, and had exercised privileges and franchises not conferred upon it by law, because of its participation in a combination between the owners of all the sugar refineries in the state, and, with few exceptions, in the United States. The combination rested upon a written agreement, styled a "trust deed," which the defendant, with other sugar-refining corporations and partnerships, signed. By this deed, all the partnerships were to be turned into corporations, which was in fact done. Then all the shares of the capital stock of all the corporations were to be transferred to an unincorporated board, consisting of eleven persons, as trustees, to be held by them and their successors strictly as joint tenants, subject to the purposes set forth in the deed, which were, — 1. To promote economy of administration, and reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with reasonable profit; 2. To give to each refinery the benefit of all appliances and processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar; 3. To furnish protection against unlawful combinations of labor; 4. To protect against inducements to lower the standard of refined sugars; and 5. Generally to promote the interests of the parties to the deed in all lawful and suitable ways. Trust certificates were then to be divided by the trustees among the several refineries in due proportion to the value of their respective plants, and the refineries were to subdivide the blocks of certificates so apportioned to them among the stockholders, or *cestuis que trustent*, in proportion to the stock of the corporation which each stockholder held prior to the transfer to the trust board. Each corporation was to pay over its profits to the trust board, and all the profits of all the corporations were to be blended, and

from this fund the board were to declare such dividends as they might determine, from time to time, to be distributed among the holders of the trust certificates. Necessary shares might be transferred to such persons as the trustees might desire to constitute directors of the various corporations, to be held by such directors subject to the provisions of the trust deed, and to be retransferred when so requested by the board. The deed was put into execution, and a dividend was declared upon the trust certificates. It was claimed by the defendant that the acts complained of were the mere individual acts of its stockholders, in no wise binding upon it, and at all events the association was a harmless one, constituting nothing more serious than an unusually large partnership. The court, however, held that the acts were those of the corporation, and that it had thereby forfeited its franchise, and should be dissolved, because, — 1. The arrangement amounted to a partnership between the corporations, or a substantial consolidation, which they had no authority to enter into, although the purpose be lawful; and 2. The combination was unlawful, as tending to create a dangerous monopoly.

The opinion by Mr. Justice Barrett is an able one, and recognizes the modern view concerning contracts in restraint of trade as maintained by such cases: *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464. Whether he has correctly appreciated the force of the position taken by these decisions, and by such as *Mogul Steamship Co. v. McGregor*, L. R. 15 Q. B. D. 476, remains to be seen.

Somewhat the opposite view was taken in *People v. Chicago Gas Trust Co.*, 21 Chic. L. N. 326, by the circuit court of Cook County, Illinois, concerning the second class of cases noticed above, although the cases are clearly distinguishable. It was there held that where an act provided that corporations may be formed "for any lawful purpose," a corporation organized under it "to purchase and hold or sell the capital stock, or purchase or lease or operate the property, plant, good-will, rights, and franchises, of any gas works or gas company or companies in said city of Chicago or elsewhere in the state of Illinois," was formed for a lawful purpose, and would not therefore be dissolved, although by purchasing and holding a majority of the shares of stock in each of the four gas companies in the city of Chicago it had destroyed competition, and maintained a monopoly in the business of furnishing gas in the city; the purchase of stock by one corporation in another not involving moral turpitude, and the question of public policy being a question for the legislature to determine.

FORFEITURE MUST, IN GENERAL, BE ADJUDGED IN DIRECT PROCEEDINGS INSTITUTED BY STATE. — It is well settled that, in general, a corporation is not *ipso facto* dissolved by reason of the omission or commission of acts constituting a cause of forfeiture, and that its franchises remain in full force and effect until a forfeiture is declared in a direct proceeding for that purpose instituted against the corporation by the state. A cause of forfeiture cannot be taken advantage of, or enforced against a corporation collaterally or incidentally, or in any other mode than by such a direct proceeding: Angell and Ames on Corporations, sec. 777; 2 Morawetz on Corporations, sec. 1015; Taylor on Corporations, sec. 460; 2 Waterman on Corporations, sec. 430; Wood's Field on Corporations, secs. 441, 442; 2 Kent's Com. *312; note to *Folger v. Columbian Ins. Co.*, 96 Am. Dec. 756, 757; *Rex v. Amery*, 2 Term Rep. 515; *Selma etc. R. R. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; *Duke v. Cahawba Nav. Co.*, 16 Ala. 372; *Harris v. Nesbit*, 24 Id. 398; *Hudgins v. State*, 46 Id. 208; *Importing etc. Co. v. Locke*, 50 Id. 332; *State v. Real Estate*

Bank, 5 Ark. 595; 41 Am. Dec. 109; *Hammett v. Little Rock etc. R. R.*, 20 Ark. 204; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 28, 46; *Spencer v. Champion*, 9 Id. 536, 543; *Kellogg v. Union Company*, 12 Id. 7; *Pearce v. Olney*, 20 Id. 544; *National Pahquioque Bank v. First National Bank*, 36 Id. 325, affirmed 14 Wall. 383, sub nom. *Bank of Bethel v. Pahquioque Bank*; *Young v. Harrison*, 6 Ga. 139; *Union Branch R. R. v. East Tennessee etc. R. R.*, 14 Id. 327; *City of Atlanta v. Gate City Gas Light Co.*, 71 Id. 106; *Williams v. Bank of Illinois*, 1 Gilm. 667; *Bruffett v. Great Western R. R.*, 25 Ill. 353; *Baker v. Backus*, 32 Id. 79; *Attorney-General v. Chicago etc. R. R.*, 112 Id. 570; *John v. Farmers' and Mechanics' Bank*, 2 Blackf. 367; 20 Am. Dec. 119; *Brookville etc. Turnpike Co. v. McCarty*, 8 Ind. 392; 65 Am. Dec. 768; *Stoops v. Greensburgh etc. Plank Road Co.*, 10 Ind. 47; *Hartsville University v. Hamilton*, 34 Id. 506; *State v. Woodward*, 89 Id. 110; *Logan v. Vernon etc. R. R.*, 90 Id. 552; *Barren Creek Ditching Co. v. Beck*, 99 Id. 247, 249; *State v. Pipher*, 28 Kan. 127, 131; *Hughes v. Bank of Somerset*, 5 Litt. 45; *State v. New Orleans Gas Light etc. Co.*, 2 Rob. (La.) 529, 532; *Curien v. Santini*, 16 La. Ann. 27, 28; *State v. Fagan*, 22 Id. 545; *Penobscot Boom Co. v. Lamson*, 16 Me. 224; 33 Am. Dec. 656; *Rollins v. Clay*, 33 Me. 132; *Baptist Meeting House v. Webb*, 66 Id. 398; *Hamilton v. Annapolis etc. R. R.*, 1 Md. Ch. 107; *Chesapeake etc. Canal Co. v. Baltimore etc. R. R.*, 4 Gill & J. 1, 107, 122; *State v. Bank of Maryland*, 6 Id. 206, 230; *Regents of University of Maryland v. Williams*, 9 Id. 365; 31 Am. Dec. 72; *Planters' Bank v. Bank of Alexandria*, 10 Gill & J. 346; *Taggart v. Western Maryland R. R.*, 24 Md. 563; 89 Am. Dec. 760; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 371; *Russell v. McLellan*, 14 Id. 63; *Boston Glass Manufactory v. Langdon*, 24 Id. 49; 35 Am. Dec. 292; *Heard v. Talbot*, 7 Gray, 113, 119; *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71, 72; *Cahill v. Kalamazoo Mutual Ins. Co.*, 2 Doug. (Mich.) 124; 43 Am. Dec. 457; *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400; 24 Am. Rep. 585; *City of Detroit v. Detroit etc. Plank Road Co.*, 43 Id. 140; *Toledo etc. R. R. v. Johnson*, 49 Id. 148; *Minnesota Central R'y v. Melvin*, 21 Minn. 339, 344; *State v. Minnesota Central R'y*, 36 Id. 246, 258; *Bayless v. Orne*, 1 Freem. (Miss.) 161; *Grand Gulf Bank v. Archer*, 8 Smedes & M. 151; *Bohannon v. Binns*, 31 Miss. 355; *Harris v. Mississippi Valley etc. R. R.*, 51 Id. 602; *Bank of Missouri v. Snelling*, 35 Mo. 190; *State v. Carr*, 5 N. H. 367, 370; *Peirce v. Somersworth*, 10 Id. 369, 375; *State v. Fourth New Hampshire Turnpike*, 15 Id. 162, 166; 41 Am. Dec. 690, 692; *New Jersey Southern R. R. v. Long Branch Comm'rs*, 39 N. J. L. 28; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Attorney-General v. Bank of Niagara*, Hopk. Ch. 354; *Trustees of Vernon Society v. Hills*, 6 Cow. 23; 16 Am. Dec. 429; *All Saints Church v. Lovett*, 1 Hall, 191; *People v. Phoenix Bank*, 24 Wend. 431, 432; 35 Am. Dec. 634, 635; *Barclay v. Talman*, 4 Edw. Ch. 123; *Adams v. Beach*, 6 Hill, 271; *Kincaid v. Duinelle*, 59 N. Y. 548; *Matter of New York Elevated R. R.*, 70 Id. 327, 338; *Matter of Reformed Presbyterian Church*, 7 How. Pr. 476; *Central Crosstown R. R. v. Twenty-third Street R. R.*, 54 Id. 168, 185; *Mechanics' Building Ass'n v. Stevens*, 5 Duer, 676; *Brooklyn Central R. R. v. Brooklyn City R. R.*, 32 Barb. 358; *Towar v. Hale*, 46 Id. 361; *Ormsby v. Vermont Copper Min. Co.*, 65 Id. 360; *Moran v. Lydecker*, 27 Hun, 582, 585; *Hollingshead v. Woodworth*, 35 Id. 410; *Asherville Division v. Aston*, 92 N. C. 578, 585; *Receivers of Bank of Circleville v. Renick*, 15 Ohio, 322; *Centre etc. Turnpike Road Co. v. McConaby*, 16 Serg. & R. 140, 145; *McConaby v. Centre etc. Turnpike Road Co.*, 1 Pen. & W. 426; *Lehigh Bridge Co. v. Lehigh Coal etc. Co.*, 4 Rawle, 9; 26 Am. Dec. 111; *Irvine v. Lumbermen's Bank*, 2 Watts & S. 190, 204; *Commonwealth v. Cullen*, 13 Pa. St.

133; 53 Am. Dec. 450; *Coil v. Pittsburgh Female College*, 40 Pa. St. 439; *Dyer v. Walker*, 40 Id. 157; *Commonwealth v. Morris*, 1 Phila. 411, 412; *State v. Bank of Charleston*, 2 McMull. 439; 39 Am. Dec. 135; *Bank of South Carolina v. Hammond*, 1 Rich. 281, 288; *Williams v. Union Bank*, 2 Humph. 339; *La Grange etc. R. R. v. Rainey*, 7 Cold. 420; *White's Creek Turnpike Co. v. Davidson County*, 3 Tenn. Ch. 396; *Directors of Maryville College v. Bartlett*, 8 Baxt. 231; *Bache v. Nashville Horticultural Society*, 10 Lea, 436; *Mosely v. Burrow*, 52 Tex. 396; *Brandon Iron Co. v. Gleason*, 24 Vt. 228, 237; *Connecticut etc. R. R. v. Bailey*, 24 Id. 465; 58 Am. Dec. 181; *Dewey v. St. Albans Trust Co.*, 56 Vt. 476; 48 Am. Rep. 803; *The Banks v. Poitiaux*, 3 Rand. 136; 15 Am. Dec. 706; *Crump v. United States Min. Co.*, 7 Gratt. 352; *Pixley v. Roanoke Nav. Co.*, 75 Va. 320; *Baltimore etc. R. R. v. Supervisors of Marshall County*, 3 W. Va. 319, 324; *Moore v. Schoppert*, 22 Id. 282; *Greenbrier Lumber Co. v. Ward*, 30 Id. 43; *Frost's Lessee v. Frostburg Coal Co.*, 24 How. 278; *Mackall v. Chesapeake etc. Canal Co.*, 94 U. S. 308; *People v. Society for Propagation of the Gospel*, 1 Paine, 653; *United States v. Williams*, 5 Cranch C. C. 62; *Kanawha Coal Co. v. Kanawha etc. Coal Co.*, 7 Blatchf. 391; *Taylor v. Holmes*, 14 Fed. Rep. 498; *Southern Pacific R. R. v.orton*, 32 Id. 457. "It would not only be a great anomaly," says Bigelow, J., in *Heard v. Talbot*, 7 Gray, 113, 120, "to allow persons, not parties to a contract, to insist on its breach and enforce a penalty for its violation, but it would be against public policy, and lead to confusion of rights, if corporate powers and privileges could be disputed and defeated by every person who might be aggrieved by their exercise. Therefore it has often been held that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government." *A fortiori* would this be true after the legislature had repeatedly recognized the corporation as a legally existing body, subsequent to the cause of forfeiture: See *Williams v. Union Bank*, 2 Humph. 339; *White's Creek Turnpike Co. v. Davidson County*, 3 Tenn. 396; or where the majority of the members of a corporation commit an act which would justify the forfeiture of its charter, and attempt to make such act the basis of a proceeding instituted by themselves against the minority for the purpose of having the corporate franchises declared forfeited: *Curien v. Santini*, 16 La. Ann. 27, 29. The forfeiture would be incurred from the time of the commission or omission of the act for which a judgment of forfeiture may be given, but the corporation continues *de facto* until judgment of forfeiture is pronounced: *State v. Bank of Charleston*, 2 McMull. 439; 39 Am. Dec. 135.

In accordance with this rule, a plea to an action by a corporation that its charter is forfeited must allege that the forfeiture has been declared in a judicial proceeding instituted for that purpose by the government: *State v. Trustees of Vincennes University*, 5 Ind. 77, 80; *West v. Carolina L. Ins. Co.*, 31 Ark. 476; and if an action against stockholders is based upon the fact of dissolution, such a dissolution must be shown, rather than a cause for dissolution: *Valley Bank & Sav. Inst. v. Ladies' Cong. Sewing Soc.*, 28 Kan. 423; but see *Slee v. Bloom*, 19 Johns 456; 10 Am. Dec. 273; *Briggs v. Penniman*, 8 Cow. 387; 18 Am. Dec. 454; so the only competent evidence to prove a forfeiture of a charter is the judgment of a court directly in point: *Cleveland etc. R. R. v. Speer*, 56 Pa. St. 325, 335; 94 Am. Dec. 84, 90. Even where a charter or statute expressly provides that in a certain event the corporation shall be "dissolved," the charter is not *ipso facto* forfeited, or the corporation dissolved, but there must be a judgment to that effect in direct proceedings instituted for the purpose, and until that time the company remains in exist-

ence. This is so held where the charter of a corporation, formed for the purpose of supplying a city with water, provided "that said company shall, within ten years from the passing of this act, furnish and continue a supply of pure and wholesome water, sufficient for the use of all such citizens dwelling in said city as shall agree to take it on the terms to be demanded by the said company, in default whereof the said corporation shall be dissolved": *People v. Manhattan Co.*, 9 Wend. 351; or where a statute provides that if any incorporated company shall remain insolvent, neglect or refuse to redeem its notes or other evidences of debt in specie, or suspend its ordinary business, for one year, then it "shall be deemed and adjudged to have surrendered the rights, privileges, and franchises granted by any act of incorporation, and shall be deemed to be dissolved": *Bank of Niagara v. Johnson*, 8 Wend. 645; *People v. Hillsdale etc. Turnpike Road Co.*, 23 Id. 254, 257; *Mickles v. Rochester City Bank*, 11 Paige, 118; and see *Baker v. Buckus's Adm'r*, 32 Ill. 79; or even, it is held, if the charter of a banking corporation provides that, in case of a suspension of specie payment for more than ninety days, the charter "shall be *ipso facto* forfeited and void": *Atchafalaya Bank v. Dawson*, 13 La. 497; and see *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; but the correctness of this ruling is doubtful.

It has sometimes been supposed that the cases of *Slee v. Bloom*, 19 Johns. 456, 10 Am. Dec. 273, and *Briggs v. Penniman*, 8 Cow. 387, 18 Am. Dec. 454, were inconsistent with these rules; but all they really decide is, that corporations for manufacturing purposes, formed under the New York act of 1811, are dissolved within the meaning of that statute, so as to give a remedy to creditors against stockholders whenever they ceased to do business, and were divested of all their property, either by their own act or by executions at law against them.

And, after all, there seems to be no good reason why the legislature may not expressly provide that, for the failure of a corporation to comply with certain conditions, its franchises shall be *ipso facto* terminated, without the necessity of any judicial proceeding. The question would simply be one of legislative intent. Thus it is held that a railroad corporation loses its corporate rights and powers without any judicial proceeding to declare a forfeiture, by the mere non-performance of conditions to the effect that if it failed to begin the construction of its road and make a certain expenditure within a time limited for that purpose, or having made such beginning and expenditure, it failed to finish and put its road in operation within a further time allowed for so doing, then, in either case, "its corporate existence and powers shall cease": *Matter of Brooklyn etc R'y*, 72 N. Y. 245, 249; 75 Id. 335, 338; or by the non-performance of a condition that, unless a certain portion of the road should be constructed within a certain time, "all the powers, rights, and franchises herein and hereby granted shall be deemed forfeited and terminated": *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 Id. 524, Earl, J., saying: "It cannot be denied that the legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts, by any omission of duty, or violation of its charter, or default as to limitations imposed; and whether the legislature has intended so to provide in any case depends upon the construction of the language used." So where an act provides that a railroad company shall construct and equip its road within a certain time, and upon failure to do so all unbuilt portions thereof, with the properties, rights, and franchises appertaining thereto, "shall be absolutely forfeited, and shall revert to the state without any other act or ceremony whatever, legislative or judicial," a failure *ipso facto* works the

forfeiture: *State v. St. Paul etc. R. R.*, 35 Minn. 222, 224; and where a statute enacted that in case any railroad company should not, within twelve months after the acceptance of its route by commissioners, procure and pay for the right of way over all land covered by the location, such acceptance by the commissioners should be void, it was held that such failure to procure and pay for the right of way was not in the nature of a forfeiture, to be taken advantage of only by the state in a direct proceeding against the company, but that the whole proceeding became of no effect upon the expiration of the twelve months: *New York etc. R. R. v. Boston etc. R. R.*, 36 Conn. 196; and if a condition should be annexed to a franchise to construct and operate a railroad through the streets of a city, that if the company should not complete the road within a certain time, the franchise shall be "forfeited," it has been held, although with some doubt as to the correctness of the conclusion, that non-performance of the condition will work a forfeiture, without a judicial determination: *Oakland R. R. v. Oakland etc. R. R.*, 45 Cal. 365; 13 Am. Rep. 181; compare *Hovelman v. Kansas City etc. R. R.*, 79 Mo. 632; *City of Chicago v. Chicago etc. R. R.*, 105 Ill. 73, 78; and see note to *Atchison Street Ry. v. Nave*, 5 Am. St. Rep. 805. There must, however, be some such language as in the foregoing illustrations, clearly indicating the intention of the legislature, in order that a forfeiture shall result merely from the failure to obey some condition, without an adjudication to that effect. Thus where the charter of a railroad company simply provided that "if said corporation shall not, within ten years from the approval of this act, commence the construction of said railroad, then said corporation shall be dissolved," the non-compliance with the requirement was held not of itself to work a dissolution: *Day v. Oydensburgh etc. R. R.*, 107 N. Y. 129; *Matter of N. Y. Elevated R. R.*, 70 Id. 327, 338; *Brooklyn Central R. R. v. Brooklyn City R. R.*, 32 Barb. 358; and similar cases cited *supra*, this head.

FORFEITURE IS, IN GENERAL, JUDICIAL QUESTION, AND CANNOT BE DETERMINED BY LEGISLATURE. — Whether a corporation has been guilty of acts or omissions constituting grounds of forfeiture of its charter is, in general, a judicial question, and cannot be determined by the legislature: Cooley's Constitutional Limitations, *106; *Regents of University of Maryland v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72; *Bruffett v. Great Western R. R.*, 25 Ill. 353; *State v. Noyes*, 47 Me. 189; *Vermont etc. R. R. v. Vermont Central R. R.*, 34 Vt. 2, 56; *Allen v. Buchanan*, 9 Phila. 283. This rule has even been applied where it was provided that a charter shall not be repealed "unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act": *Flint etc. Plank Road Co. v. Woodhull*, 25 Mich. 99; 12 Am. Rep. 233; and where a charter provided that, if the company "shall at any time misuse or abuse any of the privileges herein granted, the legislature may resume all and singular the rights and privileges hereby granted to such corporation": *Mayor etc. of Baltimore v. Pittsburgh etc. R. R.*, 1 Abb. U. S. 9; *contra*, *Erie etc. R. R. v. Casey*, 26 Pa. St. 287.

But it must be conceded that the legislature may reserve absolutely the right to repeal the charter of a corporation, and in such case may exercise the right at its pleasure, and with or without any reason therefor. This being true, there is no valid objection why the legislature may not reserve the right to repeal upon the performance or non-performance of some condition. In such a case, it should have the right to determine whether or not the condition had been performed, and such a determination would not, properly speaking, be judicial in its nature. Accordingly, where a charter pro-

vides that if the corporation "shall fail to go into operation, or shall abuse or misuse their privileges under their charter, it shall be in the power of the legislative assembly of this territory at any time to annul, vacate, and make void this charter," the legislature may repeal the charter without judicial investigation: *Miners' Bank v. United States*, Morris, 482; 1 G. Greene, 553; or if the charter provides that "if the said company abuse or misuse any of the privileges hereby granted, the legislature may resume the rights granted the said company": *Erie etc. R. R. v. Casey*, 26 Pa. St. 287; and see *Commonwealth v. Pittsburg etc. R. R.*, 58 Id. 26, 46; *contra*, *Mayor etc. of Baltimore v. Pittsburg etc. R. R.*, 1 Abb. U. S. 9; and to the same effect, see *Crase v. Babcock*, 23 Pick. 334; *Myrick v. Brawley*, 33 Minn. 377; *Farnsworth v. Minnesota etc. R. R.*, 92 U. S. 49. The only doubt is, whether the act of the legislature is conclusive, or subject to review by the courts, and to be set aside for error. In *Miners' Bank v. United States*, 1 G. Greene, 553, Hastings, C. J., was of the opinion that the repeal by the legislature was conclusive. In *Erie etc. R. R. v. Casey*, *supra*, Black, J., thought the act not conclusive, but that it might be set aside for plain mistake of law or fact; while Lowrie, J., was of the opinion that it could not be inquired into; but it has been subsequently held that the legislature, under such circumstances, is not the final judge of the fact of misuse or abuse: *Commonwealth v. Pittsburg etc. R. R.*, *supra*.

PROCEEDINGS TO DECLARE FORFEITURE. — At the old common law, there were two modes, or properly but one mode, of proceeding against a corporation to enforce a forfeiture of its franchises; viz., *scire facias* and *quo warranto*. When the one or the other of these writs was appropriate is thus explained by Ashhurst, J., in *Rez v. Pasmore*, 3 Term Rep. 199, 244, in language that has been frequently quoted with approval: "A *scire facias* is proper where there is a legal existing body, capable of acting, but who have been guilty of an abuse of the power intrusted to them; for as a delinquency is imputed to them, they ought not to be condemned unheard; but that does not apply to the case of a non-existing body, and a *quo warranto* is necessary where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but from some defect in their constitution they cannot legally exercise the powers they affect to use"; and see *State v. Merchants' Ins. & T. Co.*, 8 Humph. 235; *Regents of University of Maryland v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72; *Baker v. Backus's Adm'r*, 32 Ill. 79, 110; *Slee v. Bloom*, 5 Johns. Ch. 366; *Washington etc. Turnpike Co. v. State*, 19 Md. 239. *Scire facias*, then, was the proper remedy by which a forfeiture was enforced. The ancient writ of *quo warranto* has, however, long since fallen into disuse, and an information in the nature of a *quo warranto* has come to be the modern remedy, not only against such bodies as assume to exercise corporate powers without any authority whatever, but also against corporations having a legal existence, for a forfeiture of their franchises: High on Extraordinary Remedies, sec. 647; Morawetz on Corporations, sec. 1030; Wood's Field on Corporations, sec. 443; *People v. Bank of Niagara*, 6 Cow. 196; *People v. Bank of Hudson*, 6 Id. 217; *People v. Washington etc. Bank*, 6 Id. 211; *People v. Bristol etc. Turnpike Road Co.*, 23 Wend. 222; *Thompson v. People*, 23 Id. 538; *State v. Paterson etc. Turnpike Co.*, 21 N. J. L. 9, 12; *Darnell v. State*, 48 Ark. 321; *Reed v. Cumberland etc. Canal Corp.*, 65 Me. 132; *Dunville etc. Plank Road Co. v. State*, 16 Ind. 456, 457; although, of course, the legislature may provide for the continued use of the writs of *quo warranto* and *scire facias*: See *State v. Moore*, 19 Ala. 514; *State v. Real Estate Bank*, 5 Ark. 595, 598; 41 Am. Dec. 109, 111.

Whether *scire facias*, or an information in the nature of a *quo warranto*, be

used, in either case the proceeding, unless otherwise permitted by statute, must be at the instance and on behalf of the state, through its proper officer, and cannot be prosecuted by a private individual: 2 Kent's Com. *313; High on Extraordinary Remedies, sec. 654; 2 Waterman on Corporations, sec. 433; *Rex v. Corporation of Carmarthen*, 2 Burr. 869; 1 W. Bla. 187; *Slee v. Bloom*, 5 Johns. Ch. 366; *Commonwealth v. Union Ins. Co.*, 5 Mass. 230; 4 Am. Dec. 50; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747; *Rice v. National Bank*, 126 Mass. 300; *State v. Paterson etc. Turnpike Co.*, 21 N. J. L. 9; *Murphy v. Farmers' Bank*, 20 Pa. St. 415; *Commonwealth v. Allegheny Bridge Co.*, 20 Id. 185; *Commonwealth v. Germantown etc. R'y*, 20 Id. 518; *Western Pennsylvania R. R. Co.'s Appeal*, 104 Id. 399; *Commonwealth v. Farmers' Bank*, 2 Grant Cas. 392; *People v. North Chicago R'y*, 88 Id. 537; *Curien v. Santini*, 16 La. Ann. 27, 29; *Chesapeake etc. Canal Co. v. Baltimore etc. R. R.*, 4 Gill & J. 1, 122; *State v. White's Creek Turnpike Co.*, 3 Tenn. Ch. 163; *State v. Butler*, 15 Lea, 104; *Denike v. New York etc. Lime and Cement Co.*, 80 N. Y. 599; *Wilmersdoerffer v. Lake Mahopac Imp. Co.*, 18 Hun, 387; *Gaylord v. Fort Wayne etc. R. R.*, 6 Biss. 286.

In such a proceeding it is indispensably necessary that the corporation should be a party: *State v. Taylor*, 25 Ohio St. 279; *Smith v. State*, 21 Ark. 294; *Baker v. Backus's Adm'r*, 32 Ill. 79; *People v. Rensselaer etc. R. R.*, 15 Wend. 113, 128; 30 Am. Dec. 33, 37. It has sometimes been held that instituting proceedings against a corporation, *eo nomine*, admitted the legal existence of the corporation: *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 614; *State v. Commercial Bank of Manchester*, 33 Miss. 474; *People v. Rensselaer etc. R. R.*, 15 Wend. 113, 129; 30 Am. Dec. 33, 38; *State v. Cincinnati Gas Light etc. Co.*, 18 Ohio St. 262; *contra*, *People v. Bank of Hudson*, 6 Cow. 217; but this rule rests upon no sound reason.

The attorney-general need not, by the general law, ask leave of court to institute proceedings to declare the forfeiture of corporate franchises: *State v. Paterson etc. Turnpike Co.*, 21 N. J. L. 9, 10; unless required by some statute: See *State v. St. Louis Perpetual Ins. Co.*, 8 Mo. 330; nor is it necessary that the legislature should, by some general or special statute, have authorized and directed proceedings to be brought: *State v. Southern Pacific R. R.*, 24 Tex. 80; *State v. Rio Grande R. R.*, 41 Id. 217, 219; and see *State v. Consolidation Coal Co.*, 46 Md. 1. It is discretionary with him to bring the suit, and hence he cannot be compelled by *mandamus* to do so: *State v. Attorney-General*, 30 La. Ann. 954; but if he is first required to obtain leave of the court to file an information, the granting of leave then rests in the sound discretion of the court: *Attorney-General v. Erie etc. R. R.*, 55 Mich. 15, 21; *People v. North Chicago R'y*, 88 Ill. 537.

The proceedings must be brought in the country or state in which the corporation was created. The courts of any other country or state would have no jurisdiction: *Society for Propagation of the Gospel v. Town of New Haven*, 8 Wheat. 464; *People v. Society for Propagation of the Gospel*, 1 Paine, 653, 656; *Carey v. Cincinnati etc. R. R.*, 5 Iowa, 357, 367; *Importing etc. Co. v. Locke*, 50 Ala. 332.

In regard to the time within which the information must be filed, in the absence of a statutory provision it has been held by one case that the court possesses a sound discretion in the matter, and will not entertain the proceedings if there has been unreasonable delay — in this instance five years — after the cause of forfeiture arose: *People v. Oakland County Bank*, 1 Doug. (Mich.) 282, 286; and see *Kellogg v. Union Co.*, 12 Conn. 7, 19; and in another case, that lapse of time was no bar: *State v. Pawtuxet Turnpike Co.*,

8 R. I. 521; 94 Am. Dec. 123; both of which propositions would seem to be correct.

The judgment in these proceedings for a forfeiture of the charter is of ouster and of seizure of the franchise into the hands of the crown or state, or in other words, of ouster and of dissolution: See *Slee v. Bloom*, 5 Johns. Ch. 366, 379; *People v. Bank of Hudson*, 6 Cow. 217; *People v. Rensselaer etc. R. R.*, 15 Wend. 113, 128; 30 Am. Dec. 33, 35; *State Bank v. State*, 1 Blackf. 267; 12 Am. Dec. 234; *State v. Pennsylvania etc. Canal Co.*, 23 Ohio St. 121, 126; although if a corporation violates a special franchise, the state may obtain a judgment declaring that particular franchise forfeited, without dissolving the company, or depriving it of the general franchise of acting in a corporate capacity: *Toledo etc. R. R. v. Johnson*, 49 Mich. 148, 151.

As to the effect of a dissolution upon the property of the corporation, and the rights of the stockholders and creditors, see *State Bank v. State*, 1 Blackf. 267; 12 Am. Dec. 234, and note; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747, and cases cited 755.

As to the pleadings and proceedings in *quo warranto* in general, see the note to *People v. Rensselaer etc. R. R.*, 30 Am. Dec. 44; and as to the burden of proof, see the note to *State v. Kupferle*, 100 Id. 268.

COURT OF EQUITY CANNOT DECREE FORFEITURE. — It is well settled that a court of equity has no jurisdiction, unless it be conferred by statute, to decree the dissolution of a corporation by forfeiture of its franchises, either at the suit of an individual or at the suit of the state: 2 Kent's Com. *313; Angell and Ames on Corporations, sec. 777; Boone on Corporations, sec. 203; 2 Morawetz on Corporations, sec. 1040; 2 Waterman on Corporations, sec. 432; note to *Cortelyou v. Hathaway*, 64 Am. Dec. 485; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747, and note; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; 6 Am. Rep. 227; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371, 389; *Slee v. Bloom*, 5 Id. 366; *Attorney-General v. Bank of Niagara*, Hopk. Ch. 354; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84, 88; *Latimer v. Eddy*, 46 Barb. 61, 67; *Belmont v. Erie R'y*, 52 Id. 637; *Society for Establishing Useful Manufactures v. Morris Canal etc. Co.*, 1 N. J. Eq. 157; 21 Am. Dec. 41; *Attorney-General v. Stevens*, 1 N. J. Eq. 369; 22 Am. Dec. 526; *President etc. v. Trenton City Bridge Co.*, 13 N. J. Eq. 46; *Terhune v. Millland R. R.*, 38 Id. 423; *State v. Merchants' Ins. & T. Co.*, 8 Humph. 235; *Baker v. Backus's Adm'r*, 32 Ill. 79; *Bayless v. Orne*, 1 Freem. (Miss.) 161; *Cady v. Knit Goods Mfg. Co.*, 48 Mich. 133, 135; *Strong v. McCagg*, 55 Wis. 624, 627; *Pixley v. Roanoke Nav. Co.*, 75 Va. 320; *Croft v. Lumpkin Chestnut Min. Co.*, 61 Ga. 465, 467; *Lejee v. Continental Passenger R'y*, 10 Phila. 362; *Taylor v. Holmes*, 14 Fed. Rep. 498, 505; but see *Attorney-General v. Railroad Companies*, 35 Wis. 425. The state alone can insist on a forfeiture, and it has an adequate remedy at law by the proceedings above indicated.

WAIVER OF FORFEITURE. — It is also a well-settled rule that the state may waive a forfeiture which has been incurred. This it may do expressly, or it may impliedly waive the forfeiture, when, with knowledge, it passes legislation which recognizes the continued existence of the corporation: Angell and Ames on Corporations, sec. 777; Boone on Corporations, sec. 203; 2 Morawetz on Corporations, sec. 1029; Taylor on Corporations, sec. 460; 2 Waterman on Corporations, sec. 429; Wood's Field on Corporations, sec. 442; *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109; *State v. Mississippi etc. R. R.*, 20 Ark. 495; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 28, 45; *Baker v. Backus's Adm'r*, 32 Ill. 79; *People v. Ottona Hydraulic Co.*, 115 Id. 281; *State v. Trustees of Vincennes University*, 5 Ind. 77, 81,

88, 89; *Atchafalaya Bank v. Dawson*, 13 La. 497, 509, 510; *State v. New Orleans Gas Light etc. Co.*, 2 Rob. (La.) 529, 531; *In re Mechanics' Society*, 31 La. Ann. 627, 630; *Bashor v. Dressel*, 34 Md. 503; *Commercial Bank of Natchez v. State*, 6 Smedes & M. 599, 623; *Nevitt v. Bank of Port Gibson*, 6 Id. 513, 524, 557; *Planters' Bank v. State*, 7 Id. 163, 177; *State v. Fourth New Hampshire Turnpike*, 15 N. H. 162; 41 Am. Dec. 690; *State v. Codwinsville etc. Road Co.*, 44 N. J. L. 496, 499; *People v. Manhattan Co.*, 9 Wend. 351; *People v. Fishkill etc. Plank Road Co.*, 27 Barb. 445; *Matter of New York Elevated R. R.*, 70 N. Y. 327, 338; *Matter of Brooklyn etc. R. R.*, 75 Id. 335, 339; *Attorney-General v. Petersburg etc. R. R.*, 6 Ired. 456, 470; *Milford etc. Turnpike Co. v. Brush*, 10 Ohio, 111, 116; 36 Am. Dec. 78, 82; *State v. Bank of Charleston*, 2 McMull. 439; 39 Am. Dec. 135; *Baltimore etc. R. R. v. Supervisors of Marshall County*, 3 W. Va. 319; as to whether a waiver can be established by showing lapse of time, see *Kellogg v. Union Co.*, 12 Conn. 7, 19; *People v. Oakland County Bank*, 1 Doug. (Mich.) 282, 286; *State v. Pawtuxet Turnpike Co.*, 8 R. I. 521; 94 Am. Dec. 123.

If a waiver by implication from an act of the legislature be relied upon, there must be reasonable grounds from which the waiver can be inferred. Thus an act extending the time for the completion of a turnpike road is not a bar to proceedings against the company for non-compliance with the requirements of its charter in respect to a portion of the road completed before the passage of the act, and on which gates had been erected and tolls collected, — there being no waiver in express terms, and nothing from which a waiver could be implied: *People v. Kingston etc. Turnpike Road Co.*, 23 Wend. 193; 35 Am. Dec. 551; and for the same reason the legislature, by an act releasing a plank road company from the construction of a portion of its road, does not thereby confirm the road as constructed: *People v. Fishkill etc. Plank Road Co.*, 27 Barb. 445. Nor does the certificate of inspectors appointed under the provisions of an act concerning turnpike roads, that the road has been constructed according to the true intent and meaning of the act, bar proceedings charging a non-compliance with the requirements of the law: *People v. Kingston etc. Turnpike Road Co.*, *supra*; *People v. Bristol etc. Turnpike Road Co.*, 23 Wend. 222; *People v. Waterford etc. Turnpike Co.*, 2 Keyes, 327, 335, 3 Abb. App. 580, 590; *People v. Fishkill etc. Plank Road Co.*, *supra*; *Commonwealth v. Tenth Massachusetts Turnpike Corp.*, 11 Cush. 171, 173.

Ordinarily, the legislature alone can waive a forfeiture: *People v. Phoenix Bank*, 24 Wend. 431, 483, 35 Am. Dec. 634, 635; *Chicago City R'y v. People*, 73 Ill. 541.

And, as above intimated, the default of the corporation must have been known to the legislature, in order to render subsequent acts, recognizing the existence of the corporation, a waiver: *People v. Manhattan Co.*, 9 Wend. 351; *Commonwealth v. Tenth Massachusetts Turnpike Corp.*, 11 Cush. 171, 174.

DISSOLUTION OF CORPORATION FOR MISUSER OR NON-USER OF ITS FRANCHISE: *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747, and note 755-758. It is a tacit condition annexed to or implied in the charter of every corporation, that the government may resume its corporate franchises for a misuser or non-user thereof: *State v. Minn. C. R. Co.*, 36 Minn. 246; *Darnell v. State*, 48 Ark. 321. And an information in the nature of a *quo warranto* is the proper proceeding against a corporation to forfeit its franchise for misuser or non-user, or to oust it from the exercise of a franchise under its charter, to which it was not legally entitled: *Id.* In Vermont and New York, a railway corporation does not *ipso facto*, by omitting to perform a duty imposed upon it by its charter, and in the absence of words in the charter mak-

ing such non-compliance a limitation upon the original grant of power, lose its corporate character; to dissolve the corporation, there must be a judicial proceeding and judgment declaring the forfeiture: *Day v. R. R. Co.*, 107 N. Y. 129.

WHEN QUO WARRANTO IS OR IS NOT sustainable against a corporation: *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405, and note 411.

CONSOLIDATION OF EXISTING CORPORATIONS: *McMahan v. Morrison*, 16 Ind. 172; 79 Am. Dec. 418, and note on subject 422-428.

CORPORATIONS HAVE SUCH POWERS ONLY as the act creating them confers, and are confined to the exercise of the powers expressly granted, and such incidental powers as are necessary to carry into effect those specifically conferred: *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; *Caldwell v. Alton*, 33 Ill. 416; 85 Am. Dec. 282; *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43; 28 Am. Rep. 9; and corporate charters are to be construed strictly against the grantees: *Port of Mobile v. Railroad Co.*, 84 Ala. 115; 5 Am. St. Rep. 342, and note 353. In the absence of statutory authority, a corporation has no right to sell or transfer its franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain: *Fietsam v. Hay*, 122 Ill. 293; 3 Am. St. Rep. 492; and compare the cases collected in note 495, 496.

ARAPAHOE VILLAGE v. ALBEE.

[24 NEBRASKA, 242.]

STATUTE OF LIMITATIONS WILL RUN IN FAVOR OF VILLAGES AND CITIES, and will bar action on village warrant.

VILLAGE OF ARAPAHOE, NEBRASKA, IS DE FACTO CORPORATION, and was authorized to transact business from the year 1873 to 1879, where, upon the facts stated, it appeared that in 1873 it was organized, and continued such organization down to 1879, when it was reorganized, and that officers were elected each year, except the year 1877.

John Dawson, for the plaintiff in error.

W. S. Morlan, for the defendant in error.

MAXWELL, J. The plaintiff brought an action against the defendant, and alleges in his petition that the defendant is duly incorporated as a village under the general laws of the state of Nebraska. That on the twenty-seventh day of December, 1873, said defendant being justly indebted to Acres, Blackmore, & Co. in the sum of \$69.35, which said indebtedness was at that time due and unpaid, the board of trustees, being then in regular session as the board of trustees of said village, did order and allow the said claim and demand of said Acres, Blackmore, & Co., and did adjudge that the said Acres, Blackmore, & Co. be paid on account thereof the sum of \$69.35, and thereupon, because of the promises, did draw

and issue to said Acres, Blackmore, & Co. the certain warrant of said village, numbered one, duly signed by E. B. Murphy, who was the chairman of said board of trustees, and countersigned by C. F. Colwell, clerk of said village and of said board, and attested by the seal of said village, and directed to the treasurer thereof, and which commands the treasurer to pay to Acres, Blackmore, & Co., or bearer, the sum of \$69.35 out of the general fund of said village. On the tenth day of March, 1874, said warrant was duly presented for payment to, and payment thereof duly demanded from, the treasurer of said village, and said treasurer thereupon indorsed upon said warrant the following words:—

“Registered for payment, March 10, 1874; not paid for want of funds, and there never has been any funds to pay the same.

“G. W. COLVIN, Treasurer.”

And then and there said treasurer, for want of funds, refused to pay said warrant, or any part thereof. Said warrant was in words and figures following, to wit:—

“\$69.35.

STATE OF NEBRASKA,

“TOWN OF ARAPAHOE, Dec. 27, 1873.

“Treasurer of the town of Arapahoe: Pay Acres, Blackmore, & Co., or bearer, \$69.35, and charge to account of general fund. By order of the town council. No. 1.

“E. B. MURPHY, Chairman Board of Trustees.

“C. COLWELL, Clerk.

“Registered for payment, March 10, 1874.

“G. W. COLVIN, Treasurer.”

Subsequently, but before the commencement of this action, said warrant was, by said Acres, Blackmore, & Co., for a valuable consideration, transferred and delivered to the plaintiff, who is now the lawful holder and owner thereof, but that no part of said warrant has been paid, nor is there now, nor has there been at any time, any funds or moneys in the treasury of said village for application to the payment of said warrant; and said defendant has at all times neglected, and still neglects and refuses, by levy of taxes or otherwise, to provide for the payment of the same, or any part thereof, and there is now due the plaintiff thereon the sum of \$69.35, and ten per cent interest from the twenty-seventh day of December, 1873, for which amount plaintiff asks judgment.

There are eleven counts in the petition upon causes of action similar to that above set forth.

The village filed an answer, in which,—1. It denies that it was incorporated at the time said indebtedness was incurred; 2. Interposes a plea of the statute of limitations; 3. That certain warrants described in specified counts of the petition were issued to aid in constructing a water grist-mill in said village without being authorized by a vote of the electors thereof; 4. That a portion of the indebtedness (describing it) was incurred for stationery and letter-heads for the use of the people of the village.

There is a stipulation of facts set out in the record which need not be copied.

On the trial of the cause the court found the issues against the village, in all matters except as to the warrants issued for the water grist-mill, and rendered judgment accordingly. Both parties prosecute error to this court.

The agreed statement of facts shows that all the warrants were issued in 1873 and 1874, and in the latter year were presented to the treasurer of the village for payment, and payment refused for want of funds, and this refusal and the reason therefor were indorsed on each of the warrants. Nothing has been paid on any of them from that time until the present; and the question arises whether or not the action is barred by the statute of limitations.

In *Brewer v. Otoe County*, 1 Neb. 373, it was held that the statute of limitations did not apply to county warrants. In that case certain warrants had been presented for payment, running from the year 1858 to 1863, and indorsed, not paid for want of funds. The court, by Lake, J., say (page 383):—

“That the legislature never intended that county warrants should be affected by the limitation act before referred to is evident, I think, from the whole course of legislation respecting them. As late as the 12th of February, 1866, it was enacted that ‘all debts heretofore incurred by the county commissioners of any county, acting in good faith, and duly recorded at the time on their books, shall be deemed valid, and the county shall be held liable for the same’: R. S., c. 5, sec. 1.

“Chapter 9, section 1, provides that ‘all county orders heretofore drawn, or that may hereafter be drawn, by the proper authorities of any county, shall, after having been presented to the county treasurer, and by him indorsed, not paid for want of funds in the treasury, draw interest from said date at the rate of ten per cent per annum.’

"From these, as well as numerous other enactments of the legislature that might be cited, I have reached the conclusion that the plea of the statute of limitations cannot be successfully made against these warrants, and that whenever it can be shown that the funds have been collected out of which they can be paid, or sufficient time has been given to do so in the mode pointed out in the statutes, their payment may be demanded, and if refused, legally coerced."

In view of this and other special legislation in regard to county warrants, the court held that they were excluded from the operation of the statute of limitations. That decision is no doubt correct as applied to the facts of that case. A considerable part of the debts for which those warrants were issued was incurred before the act "to prevent overdrawing public funds in counties," etc., was passed: Laws of 1859, pp. 101, 102. Prior to the passage of that act there was practically no restriction upon the power of county commissioners to issue warrants, and in more than one county this power had been recklessly exercised, and a very large number of warrants issued. Hence, the necessity for special legislation. We know of no legislation, however, which prevents the statute from running in favor of cities and villages. In *May v. School District*, 22 Neb. 205, 3 Am. St. Rep. 266, where an action was brought on a school district warrant more than five years after it was due, it was held that the plea of the statute of limitations was a complete defense. That decision was rendered after careful consideration of the question, and we believe it is a correct statement of the law. The statute of limitations is a statute of repose, and the reasons which operate in favor of an individual are at least equally as strong in favor of a municipal corporation. The law favors diligence, and compels a party holding a warrant of a municipal corporation to take the necessary steps to enforce the payment of the same within the period fixed by statute, or be barred. If this were not so, warrants might be fraudulently issued by the authorities of a municipal corporation, and held for ten, fifteen, or twenty years, or more, and then presented for payment, when the evidence of their fraudulent character had become obscure or inaccessible. In our view, the ends of justice will be better subserved by placing individuals and municipal corporations on the same plane and governed by the same law of limitations. It follows that all the causes of action were barred when the action was brought.

Objection is made that the village of Arapahoe was not

legally organized in the year 1873, and that therefore it had no authority to act as a village. The agreed statement of facts shows that in the year 1873 the village was organized, and that this organization continued up to the year 1879, when it reorganized under the laws of the state, and has continued under such organization up to the present time. Village officers were elected each year, except in the year 1877. It is evident that the village was a *de facto* corporation, and upon the facts stipulated was authorized to transact business. The several causes of action, however, being barred by the statute of limitations, the judgment of the district court against the village of Arapahoe is reversed, and the cause remanded for further proceedings.

WHEN STATUTE OF LIMITATIONS RUNS AGAINST COUNTY AND LIKE WARRANTS. — It is said in Wood on Limitations, section 53, that "the statute runs for or against towns and cities, and also for or against counties, in the same manner as it does for and against individuals." See also 2 Dillon on Municipal Corporations, sec. 668. This general proposition is sustained by numerous cases: *City of Pella v. Scholte*, 24 Iowa, 283; 95 Am. Dec. 729, and note 740; *County of St. Charles v. Powell*, 22 Mo. 55; 66 Am. Dec. 637; *City of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298; 32 Am. Dec. 718, and note 719; *May v. School District*, 22 Neb. 205; 3 Am. St. Rep. 266; *Evans v. Erie County*, 66 Pa. St. 222; *Simplot v. Chicago etc. R. R. Co.*, 16 Fed. Rep. 350, 360; *School Directors v. Goerges*, 50 Mo. 194; *Pimental v. San Francisco*, 21 Cal. 351; *Mellinger v. City of Houston*, 68 Tex. 37, 41; *Kennebunkport v. Smith*, 22 Me. 445; *Forsyth v. Wheeling*, 19 W. Va. 318, 322; *Gaines v. Hot Spring Co.*, 39 Ark. 262; *Oxford v. Columbia*, 38 Ohio St. 87; *Kellogg v. Decatur County*, 38 Iowa, 524; see also *Wheeling v. Campbell*, 12 W. Va. 36, 66, where the question is fully considered, and the states where the rule obtains, as well as those where it does not, are named. In determining whether the statute runs against county and like warrants, the general rule above given ought to govern, in the absence of legislation to the *contra*, since there is nothing in the character of such warrants to indicate that a different rule should apply. Bonds issued by municipalities have been held subject to the defense of the statute: *De Cordova v. Galveston*, 4 Tex. 470, 482; *Clark v. Iowa City*, 20 Wall. 583; *Koshkonong v. Burton*, 104 U. S. 668; and the statute will also run against an unliquidated claim against a county: *Baker v. Johnson County*, 33 Iowa, 151. Ordinarily, county and like warrants differ from bonds and negotiable paper in many respects. "Such warrants or orders, drawn for ordinary municipal expenses, are not intended to have the qualities of negotiable paper, but are instruments authorized for convenient use in conducting the current and ordinary business of the corporation, and as a means of anticipating its ordinary revenue": 1 Dillon on Municipal Corporations, secs. 487, 503. There would seem, therefore, no reason why the statute should not run equally in case of such warrants as in case of negotiable paper. In *Baker v. Johnson County*, *supra*, it was held, however, that the statute would not commence to run until the claim was presented for payment to the board of supervisors. See also *Brehm v. Mayor etc. of New York*, 104 N. Y. 186. In the case of *Justices etc. of Bibb County v. Orr*, 12 Ga.

137, the court decided that the statute did not commence to run on certificates issued under a legislative act, in liquidation of a county debt, until payment thereon was denied; and to the same effect is *Caldwell County v. Harbert*, 68 Tex. 321. So where a county warrant is made payable out of a special fund, no action can be maintained until the fund out of which it is payable comes into existence, and the statute does not begin to run until that time: *Wetmore v. Monroe County*, 73 Iowa, 88. It is declared in *Bank of Galatin v. Baber*, 6 Lea, 273, that in Tennessee such order or warrant, drawn on the county trustee in favor of a teacher for services performed, was not a negotiable instrument of any kind, although payable to her or her order, "nor a liquidated or settled account, signed by the debtor, nor the satisfaction of the original indebtedness," but that it was "only a mode of reaching the money in the county treasury for the payment of county debts," and that a failure on the part of the creditor to present the order within the time limited by statute, after his right of action accrued, would bar the remedy, since the order was only a means of payment, and required diligence in securing the money thereon.

THE STATUTE OF LIMITATIONS RUNS FOR AND AGAINST SCHOOL DISTRICTS in the same manner as it does for or against individuals: *May v. School Dist. of Cass Co.*, 22 Neb. 205; 3 Am. St. Rep. 266, and note 267, as to the statute of limitations running against municipal or public corporations, but not against the state or sovereignty.

WILCOX v. RABEN.

[24 NEBRASKA, 368.]

JURISDICTION. — APPEAL BY ONE PARTY TO AN ACTION WHERE THE INTERESTS OF ALL PARTIES ARE INSEPARABLY CONNECTED, removes the case to appellate court for all, and gives that court jurisdiction to render judgment against all; this rule applies to an action against principal debtor and his sureties on their joint and several promissory note.

CONFIRMATION OF EXECUTION SALE OF REAL ESTATE CURES ALL DEFECTS AND IRREGULARITIES in the proceedings relating thereto, where the court making the order is one of competent jurisdiction; such order cannot be collaterally attacked.

ORDER OF CONFIRMATION OF SALE OF REAL ESTATE ON EXECUTION IS VALID, AND ADJUDICATES THE VALIDITY OF SALE, although such order does not fully describe the property sold, if the defective description is aided by a correct description contained in the officer's return, to which reference is made by the date of sale.

Hainer and Kellogg, for the plaintiff in error.

A. W. Agee, for the defendant in error.

REESE, C. J. This was an action in ejectment, instituted in the district court by plaintiff in error, for the recovery of lots No. 3 and 4 in block No. 30 in the original town of Aurora.

It appears from the record that, in the year 1872, Durias Wilcox, the husband of plaintiff in error, and who is now

deceased, secured the title to the northeast quarter of section 4, township 10 north, of range 6 west, in Hamilton County, from the United States, under the pre-emption laws, and that thereafter the land was platted as a part of the town site of Aurora. Soon after obtaining the patent from the United States, Wilcox and wife conveyed a portion of the premises, including that upon which the lots in question were situated, to Mary A. E. Stone. On the nineteenth day of December, 1872, Durias Wilcox as principal, and Cynthia A. Wilcox, the plaintiff, John Schultz, and Abraham Kinley as sureties, executed and delivered to one David Stone their joint and several promissory note in the sum of \$275, bearing interest at the rate of ten per cent per annum. The next day the lots in question, with others, were conveyed by Mary Stone and her husband to Durias Wilcox, and on the twenty-fourth day of the same month Durias deeded the same to his wife, the plaintiff. Stone brought suit upon the note against all of the makers, and on the seventh day of July, 1873, obtained a judgment in the probate court of Hamilton County for the amount due. From this judgment Durias appealed to the district court. A trial was had in that court, which again resulted in a judgment in favor of the holder of the note against the makers. An execution was issued and levied upon the property in dispute, with other real estate, and a sale was had, which was afterwards confirmed by the district court, and a deed was duly executed to the purchaser.

This action is now brought by the plaintiff in error, as the owner of the real estate under the deed from her husband; her contention being, that the judgment of the district court, upon which the order of sale was issued, was improperly rendered against her, as she had taken no appeal, and the general appearance for her by the attorneys representing the defendants was without authority.

It is insisted that the appeal from the probate court was taken by Durias Wilcox alone, and that therefore the district court had no jurisdiction over her to render the judgment.

I think it sufficiently settled, in this state at least, that where the interests of the parties are inseparably connected in an action, an appeal by one will remove the cause to the appellate court for all: *Lepin v. Paine & Co.*, 18 Neb. 629, and cases there cited.

Durias Wilcox was the principal debtor upon the note; any defense made by him inured to the benefit of his sureties, and

therefore the appeal, even if taken by him alone, and without express authority from the other defendants, removed the cause into the district court as to all.

It is insisted that the sheriff's deed to defendant conveyed no title, and in support of this it is urged that the execution is defective, in that it misrecited the amount of the judgment; that the return of the officer was defective for various reasons mentioned; that the notice of sale, the appraisement, and the sale itself were so defective as to vest no title in defendant. These questions were, or should have been, presented to the district court at the time of the hearing upon motion to confirm the sale. The district court evidently had jurisdiction of the parties and of the subject-matter. The confirmation of the sale, therefore, cured all defects and irregularities, if any, in the proceedings, and such order cannot now be attacked collaterally: *Neligh v. Keene*, 16 Neb. 407.

It is contended that the order of confirmation was void, and therefore no adjudication upon the validity of the sale. The record shows that, after the sale of the property, the return was made by the sheriff to the district court at the June term of 1877. The plaintiff in that action appeared by his attorney, defendants by their attorneys, and the cause came on to be heard on the motion of the defendants to set aside the sale. This motion was argued, and on consideration thereof it was overruled. The attorney for the plaintiff then moved for an order of confirmation, which was granted, the sale confirmed, and the sheriff was ordered to make to the purchasers of the real estate sold the necessary deeds of conveyance. It is objected that this order was void, for the reason that it did not describe the property sold and to be conveyed. The description of the property seems to be perfect by lots and blocks, with the exception that it is not stated that they are situated in the town of Aurora, Hamilton County, Nebraska. While it is true that the description of the property should be given in the order of confirmation, yet this defect is no doubt aided by the return of the officer to what is denominated therein the order of sale, meaning beyond question the execution. In that paper the description of the lots and blocks is given, together with the statement that they are in the town of Aurora, Hamilton County, Nebraska. This return was found to be correct by the district court by its order of confirmation, and the lack of description in said order is aided by the correct

description contained in the return, and to which reference is made by the date of sale. Afterwards a motion was made by defendants to set aside the order of confirmation and grant a rehearing on the motion to set aside the sale. Notice of this motion was served upon the plaintiff in the action, and that it would be heard before the district judge of the fourth judicial district at a place named on the fifth day of July, 1877, at ten o'clock, A. M., of said day. On that day the parties appeared by their attorneys. The motion was argued, and it was found by the judge that the sale had been made in conformity with the law, that the order of confirmation had been properly granted, and the motion for rehearing was overruled. It is now insisted that by the law in force at that time the judge had no jurisdiction at chambers, and therefore his action was void.

We are unable to see how this can become a vital question in this case, for the reason that the order of confirmation was made in term time by the court, and was never in any manner vacated or set aside. The judge at chambers simply refused to interfere with that order. We therefore hold that the order of confirmation was valid, and cannot now be attacked in this collateral way.

In accordance with the allegations of the answer, it was shown upon the trial that extensive improvements had been made upon the property by defendant after his purchase, and prior to the commencement of this action, with the knowledge of plaintiff, and without objection having been made by her, the improvement and possession of defendant extending over some five years. This notice might be sufficient to prevent a recovery in this case under the rule stated in *Gillespie v. Sawyer*, 15 Neb. 529; but as we think the decision of the district court was correct, aside from this consideration, we will not discuss it.

The judgment of the district court is affirmed.

APPEAL BY ONE OF SEVERAL JOINT DEFENDANTS: *Lovejoy v. Irelan*, 17 Md. 525; 79 Am. Dec. 667, and note 669.

SALES RATIFIED BY COURT HAVING JURISDICTION SHOULD BE UPHOLD by every legal intendment when they are collaterally attacked; and if errors and irregularities exist, they are to be corrected by a direct proceeding, either before the same or an appellate court: *Cockey v. Cole*, 28 Md. 276; 92 Am. Dec. 684, and note 688. But confirmation cannot validate a void sale: *Bethel v. Bethel*, 6 Bush, 65; 99 Am. Dec. 655, and note 658. Purchasers at judicial sales are only required to see that the court has jurisdiction, and

that the judgment authorizes the sale. They will be protected against the errors and irregularities of the court and the laches of the parties: *Grimes v. Taft*, 98 N. C. 193. It is the policy of the law to indulge in every reasonable presumption in favor of sustaining the ministerial acts of officers making judicial sales: *Evans v. Robberson*, 92 Mo. 192.

HIGGINBOTTOM v. BENSON.

[24 NEBRASKA, 461.]

IMPROVEMENTS BY PURCHASER AFTER FORECLOSURE OF SENIOR MORTGAGE

— ACTION BY JUNIOR MORTGAGEE — VALUE OF RENTS AND PROFITS. —

Purchaser in good faith of real estate at judicial sale, after foreclosure of senior mortgage, is entitled to credit for improvements as against junior mortgagees, although the latter were not parties to the foreclosure suit. And in an action to compel such purchaser to redeem a junior mortgage, or for a sale of the land, he is not chargeable with the value of rents and profits while in possession.

Hainer and Kellogg, for the appellant.

J. H. Smith, for the appellees.

REESE, C. J. This action was commenced in the district court of Hamilton County by plaintiff, the holder of a junior mortgage on real estate, against defendant, the purchaser of the land at judicial sale upon the foreclosure of a prior mortgage, for the purpose of requiring him to redeem plaintiff's mortgage, or in case of his failure so to do, that the premises be sold. Upon trial the district court found that defendant's grantor had purchased the property at judicial sale, as alleged, and that while in the possession thereof, subsequent to such purchase, and in the belief that he was the owner, placed lasting and valuable improvements thereon of the value of \$791, for which he was entitled to credit. The court also refused to charge him with the value of the rents and profits during the time of his possession. From this decree plaintiff appeals, and alleges that the district court erred, — 1. In allowing defendant for his improvements; and 2. In refusing to charge him with the rents and profits; and the decisions upon these two questions are now presented for review.

We think it pretty well settled that improvements made by a purchaser in good faith upon real estate after foreclosure of a senior mortgage constitute an equity in favor of such purchaser, which will be protected as against junior mortgagees. It is quite probable that had not the improvements been made, plaintiff would not have sought to compel a re-

demption. The property was sold, presumably, for all it would bring in the market at the time of its sale, and purchased by Benson, defendant's grantor. It would seem to be against equity for a junior mortgagee to remain passive until valuable improvements were made, and then compel the purchaser in possession to redeem from his mortgage, or, in case of his inability to do so, resell the property, made more valuable by the improvements, without any allowance therefor. By the purchase at the foreclosure sale, Benson became the owner of the legal title held by the mortgagor at the time of the execution of the first mortgage to the New England Mortgage Security Company, and also of the equitable title or lien held by that company by virtue of its mortgage; and also entitled to the possession of the property by virtue of his ownership of the legal title. Under the rule stated in *Wetmore v. Roberts*, 10 How. Pr. 51, *Mickles v. Dillaye*, 17 N. Y. 80, and *Poole v. Johnson*, 62 Iowa, 611, he was entitled to compensation for the improvements made, as an equity superior to that of plaintiffs. By the same authority, and the statutory provision of this state, he would not be required to account for rents or profits.

The rule of the common law, that a mortgagee of real estate is entitled to the possession of the mortgaged property, is changed by the law of this state, and the mortgagor, in the absence of an agreement to the contrary, is entitled to such possession: Comp. Stats., c. 73, sec. 55. The mortgage is but a lien. In his capacity as grantee of the mortgagor, Benson was entitled to the possession of the property without reference to the wishes of the mortgagee. Were he simply the mortgagor, he would not be entitled to compensation for improvements, for in that case he could not be said to have expended his money upon the faith of a perfect title. But being a purchaser, not only of the title of the mortgagor, but of the rights of the senior mortgagee, at a judicial sale upon a foreclosure of the senior mortgage, and in the belief of having acquired a perfect title thereby, he stands in a very different position from that which a mortgagor would occupy prior to a foreclosure. Defendant's possession was that of owner of the fee by his purchase at judicial sale. As between him and plaintiff, he was not chargeable with the value of rents and profits while in possession: *Renard v. Brown*, 7 Neb. 449. And under the rule stated in *Poole v. Johnson*, 62 Iowa, 611, as well as upon the application of the principles of equity, he

would be entitled to credit for the value of such permanent improvements as actually increased the value of the property. Assuming that Benson purchased in good faith, believing he was getting a perfect title, and paying all the land would bring in the market, would it be right to say he should receive nothing for his improvements, if by such improvements the value of the land being increased to the extent of plaintiff's claim, it should be resold, and that increased value given to plaintiff? We think not.

The decree of the district court was correct, and it is affirmed.

RIGHT OF JUNIOR MORTGAGEE TO REDEEM when not made party to a suit to foreclose a prior mortgage: *Anson v. Anson*, 20 Iowa, 55; 89 Am. Dec. 514, and note 616.

POSSESSOR OF LAND IN GOOD FAITH is entitled to compensation for improvements made by him: *Sartain v. Hamilton*, 12 Tex. 219; 62 Am. Dec. 524, and note 529. To the same effect is *Moore v. Ligon*, 30 W. Va. 147.

ONE WHO BUYS MORTGAGED PREMISES WITHOUT ACTUAL KNOWLEDGE of the mortgage, which is however recorded, and puts betterments on the premises, can have no allowance therefor unless there is a surplus on foreclosure: *Wharton v. Moore*, 84 N. C. 479; 37 Am. Rep. 627.

DICKERSON v. DICKERSON.

[24 NEBRASKA, 530.]

RECONVEYANCE TO HUSBAND OF LAND DEEDED TO WIFE WILL BE ORDERED, WHERE SHE ABANDONS HIM WITHOUT CAUSE, and such land was conveyed to her at her solicitation by reason of his confidence in her as his wife, to relieve her anxiety, and to provide her with a means of support in case of his death.

D. F. Osgood, for the appellants.

S. P. Davidson and B. F. Perkins, for the appellee.

MAXWELL, J. The plaintiff and defendant Charlotte are husband and wife, having been married in 1861. In 1883 the plaintiff possessed a homestead of 160 acres, in Johnson County, on which he and his wife resided. At that time the defendant stated to the plaintiff that, as they had no children, the land, in case of his death, would descend to his heirs, and leave her without a home or means of support. He assured her that such would not be the case, but to relieve her anxiety, he, at her instance, conveyed eighty acres of said land, con-

taining the house, orchard, etc., to a sister of the defendant as trustee, who immediately conveyed to the defendant.

In 1886 the defendant deserted the plaintiff, and went to Arkansas to reside with a son by a former marriage, and has since continued to remain with said son, without the consent of the plaintiff. The plaintiff brought this action to obtain a reconveyance of the above land, and on the trial of the cause in the court below a decree was rendered in his favor, from which the defendant appeals.

So far as appears, the plaintiff's treatment of the defendant was the same after the execution of the deed as before, and the clear weight of the evidence is, that he always treated her kindly. That the deed was obtained by the defendant from the plaintiff by reason of the confidence which he placed in her as his wife, is clearly shown. The land was still to be occupied as a homestead by both of them. The conduct of the defendant prior to the making of the deed was such as might reasonably have led the plaintiff to suppose that the defendant was satisfied with her condition, and would continue to reside with him so long as they both should live, and by reason of this confidence she obtained the title. Having obtained the property under the implied agreement that the marriage relation should continue to exist, and the parties reside together, the defendant will not be permitted to retain property which she acquired from her husband by deceit and imposition. Had the defendant notified the plaintiff before the execution of the conveyance that she intended to desert him, it is very clear that it would not have been made. The conveyance was not voluntary, in the sense that it was executed as the free-will of the plaintiff, nor was it a gift. Cases relating to such conveyances, therefore, are not in point.

A party who, by means of the confidential relations between the parties, by deceit and imposition obtains property of the other, will be compelled in a proper case by a court of equity to restore the same to the party injured: *Huguenin v. Basely*, 14 Ves. 290; *Taylor v. Taylor*, 8 How. 200; *Blandy v. Kimber*, 24 Beav. 148; *Gouldard v. Carlisle*, 9 Price, 169; *Boney v. Hollingsworth*, 23 Ala. 698.

The judgment of the district court is right, and is affirmed.

WHERE FIDUCIARY RELATION EXISTS BETWEEN PARTIES, and by means of such relation one party fraudulently obtains property of the other, a court of equity in a proper case will compel its restoration to the party injured: *Fisher v. B. & Q.*, 103 N. Y. 25; 2 Am. St. Rep. 357, and cases collected in note 361.

WISDOM v. WISDOM.

[24 NEBRASKA, 551.]

DECREE OF DIVORCE OBTAINED BY FRAUD MAY BE SET ASIDE on motion after term rendered by court having jurisdiction, as in case of other judgments.

Burke and Prout, for the plaintiff in error.

R. W. Sabin, for the defendant in error.

REESE, C. J. Plaintiff, by her guardian and next friend, filed her petition in the district court of Gage County, in which she alleged, in substance, that she was a resident of Colfax, Taylor County, state of Iowa, where she had resided more than twenty years last past; that on the ninth day of September, 1857, she was the lawful wife of defendant, and had lived and cohabited with him as such from said date until about the first day of March, 1881; that about said time he willfully deserted her, without cause, and has not lived with her since that time; that on the twenty-seventh day of November, 1882, by the judgment of the circuit court for Taylor County, in said state, she was adjudged to be of unsound mind, and that Virgil Chipman was duty appointed her guardian, which relation he still sustained to her; that defendant Moses B. Wisdom, after having so deserted her, came to Gage County, in this state, and after living in said county for a time, and without the knowledge of plaintiff or her guardian, in the month of August, 1883, instituted proceedings in the district court of said county for the purpose of obtaining a divorce from her, on the ground that she had deserted him, and had been willfully absent from him for more than two years, and that on the thirteenth day of February, 1884, he did obtain from the said court a decree of divorce upon the ground named; that she had no actual notice whatever of the pendency of said suit, nor was there either actual or constructive notice given her thereof sufficient to confer upon said court jurisdiction to render such decree; that the decree was fraudulently obtained by defendant, and the ground alleged in said petition was untrue, she never having deserted him, and that he had no legal or equitable ground upon which to obtain such decree; that instead of his charge of desertion being true, he had, without any ground whatever, deserted her, and that she, at the time of filing her petition, resided in the same place where she resided at the time of said alleged

desertion; that in the year 1880, while defendant was living with plaintiff in their dwelling-house, which was owned by him, and while his family consisted of the plaintiff and eight children, he became enamored of one Sarah E. Knox, who is made defendant, who was a married woman, residing with her husband and family of five or six children, within a quarter of a mile of the residence of plaintiff and defendant, and that the said Sarah E. Knox reciprocated the amorous advances of defendant, and that they maintained adulterous relations with each other for some time prior to defendant's departure for Nebraska; that about the year 1881 they entered into a fraudulent conspiracy to leave their families, and go to Nebraska, intending to stay sufficiently long in said state to obtain each a divorce, and then become married to each other; that in pursuance of said design and conspiracy, they left their families in Iowa, and came to Gage County, in this state, and on the sixth day of August, 1883, defendant Moses B. Wisdom commenced his divorce proceedings in the district court of said county; that on the fourteenth day of November of the same year Mrs. Knox instituted like proceedings for a divorce from her husband; that Moses B. Wisdom obtained his decree of divorce on the thirteenth day of February, 1884, and Mrs. Knox obtained hers on the fifteenth day of the same month and year, and that immediately after, and on the said fifteenth day of February, 1884, a marriage license was procured, and they were married, and that ever since said time they fraudulently held themselves out to the world as husband and wife; that the adulterous relations existing between said defendants at the time of their departure from Iowa were continued in this state, from the time of their arrival to the time of the filing of the petition; that at the time of the pretended decree of divorce of defendant Moses B. Wisdom from plaintiff, that plaintiff was and for a long time prior thereto had been of unsound mind; that she was then and ever since has been under the protection of a guardian, all of which was well known to defendants at the time of their pretended marriage; that she is now living with one child and without sufficient income to support herself and child, and that at the time of his pretended divorce defendant Moses B. Wisdom was worth at least the sum of fifteen thousand dollars in property; that no children have been born unto defendants Moses B. Wisdom and Sarah E. Knox.

The prayer of the petition was, that the pretended decree of

divorce procured by the defendant Moses B. Wisdom against plaintiff be opened, and that she be permitted to file her answer in said divorce proceedings, setting up the true facts alleged in her petition, and also to allow her to establish her just rights as to the allowance of alimony, and that Sarah E. Knox be made defendant and required to answer, showing any equities she might have growing out of said pretended marriage, and for general relief.

To this petition defendants severally demurred. The demurrer of Moses B. Wisdom was upon three grounds, as follows: "1. The court has no jurisdiction of the person of defendant; 2. There is a defect of parties plaintiff; 3. That said petition does not state a cause of action against defendant and in favor of plaintiff."

This demurrer was overruled by the court, and the defendant, declining to answer further, elected to stand upon his demurrer, whereupon the decree of divorce was set aside that plaintiff might make her defense, — to all of which defendant excepted. He now alleges error in this court, and seeks a review by proceedings in error.

It is contended by plaintiff in error that the proceedings in the district court were instituted under the provisions of section 602 of the Civil Code. This section, so far as it may be deemed applicable to this case, is as follows: —

"A district court shall have power to vacate or modify its judgments or orders after the term at which such judgment or order was made. . . . 4. For fraud practiced by the successful party in obtaining the judgment or order; 5. For erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings."

Upon the other hand, it is contended by defendant in error that while the section above named gives ample authority for the proceedings, yet that plaintiff is not limited thereto, that the common-law right to institute the action in vindication of her equities exists, and that the action may be maintained thereunder. Our attention will be directed only to the latter proposition.

As the case was disposed of on a demurrer to the petition, it must be treated as if all the facts properly stated in the petition are true, and it is to be assumed that they can be fully maintained by proof, if the petitioner is allowed to adduce evidence in support of them.

A clear case of fraud is presented by these allegations. It also appears that Mrs. Wisdom was in no sense a party to this fraud, but that Mrs. Knox not only had full knowledge of the fraudulent purpose of Moses B. Wisdom, but that she was an active party thereto.

The question now presented has been examined and passed upon by a number of the courts in this country.

In *Adams v. Adams*, 51 N. H. 388, 12 Am. Rep. 134, the question was examined, and in an exhaustive opinion written by Chief Justice Bellows, it was held that courts of common-law jurisdiction have power to set aside or vacate decrees of divorce, if obtained by fraud or imposition, as in the case of other judgments, and that they will exercise that power when such fraud is clearly established. A large number of authorities are cited in the opinion as sustaining the decision of the court, and many of them are carefully reviewed. The cases of *Parish v. Parish*, 9 Ohio St. 534, 75 Am. Dec. 482, and *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454, cited by plaintiff in error, are examined, and the court refuses to agree with the reasoning in *Parish v. Parish*, *supra*, as being opposed both to principle and authority.

The case of *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393, is in point. In the opinion of the court, written by Chief Justice Bigelow, the same conclusion is reached; and in discussing the question, the chief justice uses the following language: "The statement of the question is of itself sufficient to make it apparent that, if there is no remedy by which judgments so procured to be rendered can be impeached and annulled, courts of justice may be made instruments by which the grossest frauds may be successfully accomplished, to the great wrong and injury of innocent persons. Such a conclusion cannot be supported, unless it is founded on adjudicated cases which this court is bound to regard as obligatory declarations of the law, or upon reasons of the most decisive and satisfactory nature. Upon careful examination of the authorities, we are entirely satisfied that they do not sustain the doctrine that courts have no power to grant relief to parties to a suit against whom a judgment has been obtained by fraud."

In referring to the case of *Greene v. Greene*, *supra*, it is said that the decision in that case is not in conflict with the general accord of authorities. Some of the general expressions used by the court, when disconnected from the facts of the case then in adjudication, have been thought to give sanction

to the doctrine that a decree of divorce, when once obtained, could not be impeached in any form or mode of procedure, or set aside by one of the parties to the original suit, however fraudulent and collusive may have been the conduct of the other party in its procurement. But such a conclusion is not a fair or legitimate result of the language and reasoning of the court, when considered, as it should be, solely with reference to the actual case before the court for decision.

The same rule is declared in *Young v. Young*, 17 Minn. 181, which is a case similar in some respects to that presented by the petition before us. And to the same effect, see *Allen v. MacClellan*, 12 Pa. St. 328; 51 Am. Dec. 608; *Johnson v. Coleman*, 23 Wis. 452; 99 Am. Dec. 193; *Borden v. Fitch*, 15 Johns. 121; 8 Am. Dec. 225; *Gechter v. Gechter*, 51 Md. 187; *Holmes v. Holmes*, 63 Me. 420; as well as cases cited in the American and English Encyclopædia of Law, vol. 5, pp. 844, 845.

In *Holmes v. Holmes*, above cited, and other cases which we do not now call to mind, it is held that the fact that the party obtaining the divorce had contracted a new marriage after the entry of the decree, and before any proceedings were commenced to set it aside, would not destroy the authority of the court to vacate the decree.

We are not unmindful of the fact that courts will always hesitate to set aside a decree of divorce, and especially so where a second marriage has intervened, under which children have been begotten, or rights may have become vested, but it is equally true that cases have arisen, even under the circumstances named, where courts have not refused to set aside decrees of divorce.

We are not embarrassed by these conditions in this case, for there are no children by the second marriage; and if the allegations of the petition are true, which must be assumed, Mrs. Knox is in no sense an innocent party, and can claim no rights as such.

The protection of society demands that divorces should not be granted for light or trivial causes, much less should our courts be opened for the entry of decrees procured by the fraud and deception of plaintiffs, by which rights of innocent parties might be destroyed, with no redress for the wrong committed.

We think the decision of the district court on the demurrer was correct, and it is affirmed.

POWER OF COURTS TO VACATE DECREES of divorce on the ground of fraud: *Greene v. Greene*, 2 Gray, 361; 61 Am. Dec. 454, and note 461; *Johnson v. Coleman*, 23 Wis. 452; 99 Am. Dec. 193; *Edson v. Edson*, 108 Mass. 590; 11 Am. Rep. 393; *Adams v. Adams*, 51 N. H. 388; 12 Am. Rep. 134. Courts of general jurisdiction have the authority to change, correct, revise, and vacate their own judgments at any time during the term at which they were rendered, and before the rights of the parties have become vested thereunder: *Harris v. State*, 24 Neb. 803.

KNOX v. WILLIAMS.

[24 NEBRASKA, 690.]

BURDEN OF PROOF. — WHERE USURY IN THE ORIGINAL TRANSACTION FOR WHICH NEGOTIABLE PROMISSORY NOTES WERE GIVEN IS PROVED, a party who claims to have purchased the notes before maturity must assume the burden of proof to show that he is a *bona fide* purchaser for value before maturity and without notice.

USURIOUS LOAN — SUBSEQUENT SECURITY — APPLICATION OF PAYMENTS. — Where loan is originally usurious, the plea and proof of usury applies to every subsequent security, and when the proof of usury is sufficient, the court will apply all payments of interest upon such loan as a payment *pro tanto* of the principal.

LIEN OF CHATTEL MORTGAGE IS DIVESTED BY ABSOLUTE TENDER, kept good, of the amount due on the mortgage note.

L. W. Billingsley and William H. Woodward, for the plaintiff in error.

Lamb, Ricketts, and Wilson, for the defendants in error.

MAXWELL, J. In July, 1885, the defendant in error executed and delivered to John P. Dorr a promissory note, of which the following is a copy:—

“LINCOLN, NEB., July 29, 1885.

“January 29, 1886, after date, for value received, I promise to pay to the order of John P. Dorr, three hundred and forty dollars, with interest at the rate of ten per cent per annum from date until paid. Payable at Dorr Bros.’ office, Lincoln.

“\$340. Due Jan. 29,—’86.

“Attest: H. H. Bulkeley.

his
GEORGE X WILLIAMS.”
mark

This note was secured by a chattel mortgage on certain personal property of Williams.

In January, 1886, Williams executed a second note to Dorr Brothers, apparently as interest for the excess of ten per cent on the note first given, as follows:—

"LINCOLN, NEB., January 27, 1886.

"April 27, 1886, for value received, I promise to pay to the order of Dorr Brothers, \$36.50, at their office, Lincoln, Neb., with interest at the rate of ten per cent per annum from date until paid.

"Due 4—29—'86.

his
GEORGE X WILLIAMS.
mark

"Attest: H. H. Bulkeley."

The testimony shows that the original loan for which the note for \$340 was given was but \$300. Various payments were made by Williams on the note prior to August, 1886, the exact amount being a matter of dispute between the parties. In August of that year Williams executed and delivered a new note to Dorr in lieu of those previously given, as follows:—

"LINCOLN, NEB., August 18, 1886.

"September 1, 1886, after date, for value received, I promise to pay to the order of John P. Dorr, three hundred dollars, with interest at the rate of ten per cent per annum until paid. If any of the said interest is not paid when it becomes due, it shall bear interest at the rate of ten per cent per annum from the time same note becomes due.

his
"GEORGE X WILLIAMS.
mark

"Attest: J. A. Marshall."

This note was secured by a chattel mortgage on certain personal property of Williams. On the afternoon of the fourth day of September, 1886, Dorr professes to have transferred the note in question to the Capital National Bank of Lincoln. Some time afterwards the bank transferred the note to the plaintiff. While the note was in the hands of the plaintiff, the defendant in error made a formal tender of \$250 in gold to the plaintiff, which he refused to receive. He thereupon took possession of the property described in the chattel mortgage. The defendant in error then brought an action of replevin, and on the trial of the cause the jury returned a verdict as follows:—

"We, the jury, duly impaneled and sworn in the above-entitled cause, do find: That the first note given by the plaintiff to the defendant Dorr, for the sum of \$340, to secure the loan of \$300, was usurious; that plaintiff had paid to defendant Dorr on said note or loan the sum of \$174.22; that there is still due on said note or loan the sum of \$125.78.

"2. That the second note given by the plaintiff to the defendant Dorr, dated October 18, 1886, for the sum of three

hundred dollars, and set up in the pleading, was usurious and void.

"3. That the right of property, and right of possession of said property when this action was commenced, was in the plaintiff, and we assess his damages in the premises at the sum of two dollars.

"J. R. COOKE, Foreman."

The defendant excepted to the form of the verdict, and asked to have the jury polled, and thereupon the jury was polled, each juror answering that the verdict was his verdict. A motion for a new trial was overruled, and judgment entered on the verdict, to reverse which the cause was brought into this court by petition in error.

Two questions are presented by the record: 1. Was the bank a *bona fide* purchaser of the note before it became due? 2. Was the tender of the defendant in error to the plaintiff sufficient to divest the mortgage lien?

The cashier of the bank in question was examined as a witness, but seems to have been unable to testify to particulars in the case. His testimony, taken as a whole, throws no light on the transaction. Mr. Dorr testifies in regard to the transaction, on his cross-examination, as follows:—

Q. Will you swear you did not make any arrangement with any one to have him take it (the note) from the bank?

A. I will swear I made no arrangement with Knox to have it taken from the bank.

Q. With anybody else? A. No, I will not.

Q. What arrangement with Spencer? A. I went to Mr. Spencer and told him the note was in the bank, and past due, and I did not want the bank troubled, and I asked him to get somebody to go there and buy the note.

Q. Did you furnish the money to buy the note? A. I did not.

Q. Have you since this date? A. I have not.

Q. You have \$301 as the proceeds of that note, without having paid out anything in return? A. I have.

Q. Have you agreed with Mr. Billingsley to secure Mr. Knox? A. Why, there was an understanding that if there was any expense in the collection of the note I should pay it.

He afterwards testifies that as he was liable on the note as indorser, therefore he did not want the bank to pay the expense of collection.

The rule as stated by this court in *Darst v. Backus*, 18 Neb. 231, is, that where usury in the original transaction for which

negotiable promissory notes were given is proved, a party who claims to have purchased the notes before maturity must assume the burden of proof to show that he is a *bona fide* purchaser for value before maturity and without notice. To the same effect are *Savings Bank v. Scott*, 10 Neb. 86; *Olmstead v. N. E. Mtge. Sec. Co.*, 11 Id. 492; *Cheney v. Cooper*, 14 Id. 416; *Evans v. De Roe*, 15 Id. 631. And every subsequent security given for a loan originally usurious, however remote or often renewed, is subject to the plea and proof of usury; and when the proof of usury is sufficient, the court will apply all payments of interest upon such usurious loan as a payment, *pro tanto*, of the principal: *Nelson v. Hurford*, 11 Neb. 465.

That there was usury of an aggravated character in the original transaction, is proved beyond a doubt. There is an utter failure of proof to show that the bank was a *bona fide* purchaser of the note in question before maturity. The plaintiff, therefore, having obtained the note after it became due from one who held subject to the maker's equities, is not protected. The note in his hands was subject to the same defenses as if held by the payee.

Usury being shown, all payments upon the note, whether as principal or as interest, are under the statute to be applied in payment of the principal. The payments are shown to have greatly exceeded the sum of fifty dollars. It was the duty of the plaintiff in error, therefore, to have accepted the \$250 tendered by the defendant in error. This tender was absolute, and without qualification, and has since been kept good. It therefore divested the lien of the mortgage: *Tompkins v. Batie*, 11 Neb. 147, 38 Am. Rep. 361. The plaintiff in error had no lien on the property at the time he took possession of the same, and was not entitled to possession thereof. The judgment of the district court is clearly right, and is affirmed.

ALLEGATIONS AND PROOF THAT A CONTRACT IS NOT USURIOUS, where it appears to be so, must be explicit and clear of all doubt: *Lockwood v. Mitchell*, 7 Ohio St. 387; 70 Am. Dec. 78; *Roundtree v. Brinson*, 98 N. C. 107.

USURY IN A TRANSACTION AVOIDS ALL SUBSEQUENT securities growing out of it: *Price v. Lyons Bank*, 33 N. Y. 55; 88 Am. Dec. 368. But if a security, founded upon an antecedent lawful consideration, becomes void, or tainted with fraud, the original demand will be revived, and may be enforced: *Roundtree v. Brinson*, 98 N. C. 107. When partial payment is made to a national bank under a contract to pay usurious interest, in the absence of a stipulation as to how the payment shall be appropriated, the law will apply it to that part of the contract which is legal: *Stout etc. v.*

Bank, 69 Tex. 384. In Minnesota, the statutory exception, by the terms of which "bona fide purchasers of negotiable paper" are protected from the avoiding effects of usury, is not applicable to mortgages securing negotiable paper: *Scott v. Austin*, 36 Minn. 460.

LIEN OF PLEDGEE IS EXTINGUISHED by a valid tender to him of the amount due, and his refusal to accept it: *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435, and note 440.

TENDER AFTER DEFAULT of the amount due upon a chattel mortgage must be kept good to be availing: *Tompkins v. Batie*, 11 Neb. 147; 38 Am. Rep. 361.

NORTHFIELD KNIFE COMPANY v. SHAPLEIGH.

[24 NEBRASKA, 635.]

SERVICE OF NOTICE UPON THE GARNISHEE CREATES A LIEN on the goods of the debtor in his hands, and such goods are not subject to levy and sale upon process thereafter levied during the continuance of such attachment lien.

GARNISHMENT. — ACTION IN EQUITY WILL LIE TO DETERMINE PRIORITY OF LIENS AND FOR AN INJUNCTION till final hearing, where there has been service of notices upon garnishee, and other creditors, who have obtained judgments and levied executions upon the garnished property, threaten to sell the same under execution.

COURT MAY APPOINT RECEIVER TO TAKE CHARGE OF GOODS WHERE GARNISHEE ABANDONS THE PROPERTY, or where he declines to retain the same in his hands.

W. L. Browne, O. H. Ballou, and S. P. Vannatta, for the plaintiffs in error.

M. A. Hartigan and R. B. Windham, for the defendants in error.

MAXWELL, J. This action was brought by the plaintiffs in the district court of Cass County, to restrain the defendants from selling certain goods of one John S. Duke upon executions.

It is alleged in the petition that, on or about December 20, 1887, the several plaintiffs had begun suits in said court against one John S. Duke, a hardware merchant in said county, and had sued out orders of attachment on the stock of goods then owned by said Duke; that when an attempt was made to levy said attachments, plaintiff therein learned that said Duke was not in possession of the goods, but that Sherman S. Jewett & Co., by their agent, W. S. Wise, had the actual and manual possession thereof, and the attachments were not levied, but that on further showing the plaintiffs sued out garnishee process against said Wise, and had the same served on said garnishee and Duke; that said Wise proceeded to answer said

garnishee process, and did appear in the district court of Cass County, on the sixteenth day of January, 1888, and answered in said cause that he held said stock of goods under a chattel mortgage securing eight hundred dollars, and that the invoiced and appraised value of said stock was about four thousand dollars; that the defendants and others did obtain judgments in the county court of Cass County, Nebraska, in the several sums due from said Duke, and did sue out executions on said judgments, and caused the same to be placed in the hands of M. McElwain, constable, who levied the same on the unsold portion of said stock of goods. There is also an allegation that the garnishee is about to abandon or has abandoned the care of the property. The prayer is for a decree adjusting the priority of the liens, and to enjoin the defendants from selling said property in satisfaction of the executions in their hands until the liens of the plaintiffs are satisfied, and for the appointment of a receiver.

The defendants demurred to the petition, upon the ground that the court had no jurisdiction; that the facts stated in the petition did not constitute a cause of action, and that there was a misjoinder of parties plaintiff and defendant.

The demurrer was overruled, and the defendants electing to stand on their demurrer, judgment was entered as prayed in the petition.

Three questions are presented by the record: 1. Whether service of a notice upon a garnishee creates a lien on the goods of the debtor in his hands; 2. Whether an action in equity can be maintained to determine the priority of liens, and for an injunction till the final hearing; 3. The authority of the court to appoint a person to take charge of goods which a garnishee declines to retain in his hands.

In *Mathews v. Smith*, 13 Neb. 179, and *Reed v. Fletcher*, 24 Id. 435, it was held that, upon service of a notice on a garnishee, it created a trust in the property in his possession. Hence, to entitle the creditor to serve notice upon the garnishee, the property or credits must be within the jurisdiction of the court; therefore, if a non-resident of the state should come into it for a mere temporary purpose, but have no property of the debtor in his hands in the state, he would not be liable as garnishee: *Baxter v. Vincent*, 6 Vt. 614; *Ray v. Underwood*, 3 Pick. 302; *Wright v. C., B., & Q. R. R.*, 19 Neb. 175; 56 Am. Rep. 747; *Green v. Farmers' etc. Bank*, 25 Conn. 451; *Casey v. Davis*, 100 Mass. 124; *Sawyer v. Thompson*, 24 N. H. 510; *Lawrence v.*

Smith, 45 Id. 533; 86 Am. Dec. 183; *Nye v. Liscombe*, 21 Pick. 263; *Tingley v. Bateman*, 10 Mass. 343; *Jones v. Winchester*, 6 N. H. 497; *Mathews v. Smith*, 13 Neb. 190; *Danforth v. Penny*, 3 Met. 564; *Gold v. Housatonic R. R. Co.*, 1 Gray, 424.

As is said in *Wright v. C., B., & Q. R. R. Co.*, *supra*, if it appears that the garnishee has no money or property of the principal debtor in the state, or that there is no money due from him to be paid therein, he will not be chargeable as garnishee.

The goods and the party garnished being both within the jurisdiction of the court, it will exercise such jurisdiction over them as the necessities of the case may require.

We are aware that in *Bigelow v. Andress*, 31 Ill. 322, it was held that garnishment imposed no lien upon the goods in the garnishee's hands, and did not put them *in custodia legis*. If this was the rule, proceedings by garnishment would be an expensive farce, which would give the attaching creditor no rights under the attachment. Neither can the right be restricted to the personal liability of the garnishee, as he might be insolvent or unable to pay the value of the property. We hold, therefore, that garnishment is an attachment of the goods in the hands of the garnishee, and that such goods are not subject to levy and sale upon process thereafter levied, during the continuance of said attachment.

In this case it is alleged in the petition that a number of executions had been levied by the defendants upon executions issued on judgments against Duke, and that a sale thereunder would defeat the plaintiff's claims. In such a case, while the the plaintiffs have a remedy at law by bringing separate actions against the defendants, still it would not be adequate. An action in equity, therefore, is the proper remedy to prevent a multiplicity of suits, and determine the priorities of the several liens of the parties.

Section 213 of the code provides that "the court, or any judge thereof during vacation, may, on the application of the plaintiff, and on good cause shown, appoint a receiver, who shall take an oath faithfully to discharge his duty, and shall give an undertaking to the state of Nebraska, in such sum as the court or judge may direct, and with such security as shall be approved by the clerk of the court, for the faithful performance of his duty as such receiver, and to pay over all money and account for all property which may come into his hands by virtue of his appointment, at such times and in such manner as the court may direct."

Section 214 provides that "such receiver shall take possession of all notes, bills, books of account, accounts, and all other evidences of debt that have been taken by the sheriff or other officers as the property of the defendant in attachment, and shall proceed to settle and collect the same. For that purpose he may commence and maintain actions in his own name as such receiver; but in such actions no right of defense shall be impaired or affected."

These sections apply alone to property taken under an attachment. Where the garnishee abandons the property, however, as is alleged in the petition in this case, there is no doubt of the power of the court to appoint a suitable person to take charge of the same. The court possesses this power independently of the statute. The property being a trust fund for the satisfaction of the judgment, the court may, when necessary for the preservation of the property, appoint a trustee to take charge of the same. If any party desire a receiver under the general law, the court no doubt in a proper case would appoint one. But that question does not arise here. There is no error in the record, and the judgment is affirmed.

SERVICE OF PROCESS OF GARNISHMENT DOES NOT CREATE A SPECIFIC LIEN in favor of the plaintiff upon the property of the defendant in the hands of the garnishee: *McGarry v. Lewis Coal Co.*, 93 Mo. 237; 3 Am. St. Rep. 522. Compare *Rinchey v. Stryker*, 28 N. Y. 45; 84 Am. Dec. 324, note; *Cottrell v. Varnum*, 5 Ala. 229; 39 Am. Dec. 323.

GAYER v. PARKER.

[24 NEBRASKA, 643.]

TEST WHETHER FORMER JUDGMENT IS A BAR generally is, whether or not the same evidence will sustain both the present and the former action; if different proofs are required to sustain the two actions, a judgment in one is no bar to the other.

Pemberton and Bush, for the plaintiff in error.

Hazlett and Bates, for the defendants in error.

MAXWELL, J. In the year 1883, one A. N. Wiswell procured from the defendants twelve thousand feet of fencing lumber, and other material, all being of the value of \$260. The testimony shows that Wiswell desired the lumber for a temporary purpose, and had an option either to purchase it at a price stated, or return the material to the defendants, and pay them

two dollars per thousand for the use of the lumber. There seems to have been some conversation between Wiswell and the plaintiff in error in regard to purchasing the lumber, but just what the conversation or the proposed arrangement was is not clear. The lumber and material being on the plaintiff's land, he used the same, whereupon the defendants brought an action against him for goods sold and delivered. On the trial of the cause, they apparently failed in their proof to show privity of contract between themselves and the plaintiff, and the jury found in favor of the plaintiff herein. This was so manifestly in accord with the testimony that no appeal was taken.

A second action was thereupon brought against the plaintiff herein for conversion of the material, and on the trial of the cause, a verdict and judgment were rendered against him.

The principal defense relied upon is a former adjudication in favor of the plaintiff, and therefore he is not liable.

It is said in the plaintiff's brief, page 4: "In the case at bar, the testimony showed that the defendant Gayer got the property in question, and used it for his own benefit, changing its condition and character."

A former verdict and judgment are conclusive only as to the facts directly in issue, and do not extend to facts which may be in controversy, but which rest on evidence, and are merely collateral. It must appear that the matter set up as a bar was in issue in the former case. The test as to whether the former judgment is a bar generally is, whether or not the same evidence will sustain both the present and the former action: *Clegg v. Dearden*, 12 Q. B. 576; *Crockett v. Routon*, Dud. (Ga.) 254; *Hunter v. Stewart*, 31 L. J. Ch. 346; *Taylor v. Castle*, 42 Cal. 371; *Cannon v. Brame*, 45 Ala. 262; *Percy v. Foote*, 36 Conn. 102.

If different proofs are required to sustain the two actions, a judgment in one of them is no bar to the other. Thus where the statute required an action of replevin to be brought in one year after the taking, a plaintiff defeated in such action, because not brought within the requisite time, may still maintain trover for the conversion of the property; the evidence required in both cases not being exactly the same,—as in trover it is unnecessary to prove that the taking was within a year: *Johnson v. White*, 13 Smedes & M. 584.

If different proof be required to sustain two actions, a judgment in one of them is no bar to the other: *Kirkpatrick v. Stingley*, 2 Cart. 269; *N. E. Bank v. Lewis*, 8 Pick. 113; *United*

States v. Cushman, 2 Sum. 426; *Lawrence v. Vernon*, 3 Id. 20; *Freeman on Judgments*, 259.

In *Stowell v. Chamberlain*, 60 N. Y. 272, the plaintiff brought an action against the defendant for the wrongful conversion of bonds which he alleged he had loaned to him; judgment was rendered in favor of the defendant. A second action was thereupon brought by the plaintiff against the defendant to recover the value of the bonds, which he alleged the defendant had received and sold as his agent, but failed to account for the proceeds. The former judgment was pleaded as a bar to the action. The court held that the same evidence would not sustain both actions, and that the former judgment was not a bar.

In the case under consideration, the former suit was based upon an alleged contract with the plaintiff. This contract he denied, and as there was no privity shown between the parties, that action failed. This action, however, is brought against the plaintiff to recover for lumber and material of the defendants, which, confessedly, he has in his hands, and has converted to his own use. He is liable, therefore, for the value of the material thus converted. The proof in the former action is not the same as in this, and that action is no bar. The judgment of the district court is clearly right, and is affirmed.

THE ELEMENTS NECESSARY TO CONSTITUTE A JUDGMENT IN ONE SUIT A BAR to a second suit are, — 1. That the issue in the second suit, upon which the judgment is brought to bear, was a material issue in the first suit, necessarily determined by the judgment therein; and 2. That the former judgment was upon the merits: *Liddell v. Chidester*, 84 Ala. 508; 5 Am. St. Rep. 387.

FORMER JUDGMENT. — *Res Adjudicata*, What is. — Ordinarily, a judgment is conclusive as to all matters entering therein, and objection thereto must be taken at the time judgment is rendered; but when it appears from the record that an issue is raised by the pleadings, which is left open and undetermined, such issue must be tried before final judgment can be properly entered: *Dickerson v. Wilcoxson*, 97 N. C. 309. A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; and all matters presented or presentable under the issue, either to sustain or defeat the demand litigated in a prior suit, are concluded by the judgment in such prior suit; but to this operation of the prior judgment, it must appear, either from the record or by extrinsic evidence, that the precise question was raised and determined in the prior suit: *Le Grand v. Rixey*, 83 Va. 862; *Jarboe v. Severin*, 112 Ind. 572. A judgment, in order to be a bar as *res adjudicata*, must have been a final one, and rendered on the merits: *Garrett v. Greenwell*, 92 Mo. 120. Where, in a former case, in the same court, between the same parties, it had been adjudicated that a certain alleged contract relied on by defendant did not exist, it was proper, in a subsequent case, to strike out an

answer setting up the same contract, and to exclude evidence offered to prove it: *Estes v. C., I. & D. R'y Co.*, 72 Iowa, 235. Where a married woman brought an action against a trustee to set aside a trust deed, but the court decreed that the deed should stand, and that the trustee should pay her a certain sum in satisfaction of the claim of herself and her husband in the land, such decree operated as *res adjudicata*, and estopped the husband from bringing a subsequent action against the trustee to set aside the trust deed: *Determan v. Luchrman*, 74 Id. 275. A decision by an equally divided court, where the law provides for a judgment by an equal division, determining the title to certain real estate, will be followed upon a question of the same title in a subsequent case between different parties, unless a state of facts different from that which existed in the former case is disclosed, or it be affirmatively shown that the former decision was manifestly erroneous: *Kolb v. Swann*, 68 Md. 516. A judicial determination of the issues in one action is a bar to a subsequent action between the same parties having the same object in view, although the form of the latter and the precise relief sought therein differ from the former: *Edwards v. Baker*, 99 N. C. 258. Where a judgment of the circuit court has been affirmed by the supreme court, such judgment operates as *res adjudicata*, and cannot be impeached or set aside by a court of equity, in a suit brought for that purpose, upon any ground of error apparent upon the face of such judgment, or upon the record of the case in which it was rendered: *Armstrong v. Poole*, 30 W. Va. 666. A judgment in favor of a city and one of its agents, in an action prosecuted by a citizen questioning the right of the city to embrace certain land in a street improvement, is a bar to a subsequent suit by the same plaintiff, involving the same subject-matter, for an injunction against the city and others of its agents, the corporation in each instance being the real party in interest: *Faust v. Baumgartner*, 113 Ind. 139.

Res Adjudicata, What is not. — A judgment on matters in issue on the plea in abatement in an attachment suit does not operate as *res adjudicata* as to such matters on the trial on the merits: *Garrett v. Greenwell*, 92 Mo. 120; nor does an issue raised by an answer, which is withdrawn by the defendant before trial, operate as *res adjudicata* in the determination of the cause: *Finnegan v. Campbell*, 74 Iowa, 158; nor does a decree of the supreme court overruling, in general terms, a demurrer to a bill presenting distinct grounds for relief, adjudicate that such bill is maintainable in all its aspects, but only that there is sufficient equity on its face to require an answer, and such decree does not estop the supreme court from inquiring, upon a second appeal, into the legal sufficiency of any of the grounds for relief stated in the bill: *Battle v. Street*, 85 Tenn. 282. Where plaintiff brought suit for an injunction to restrain defendants from working certain mines which plaintiff then claimed to own absolutely under a certain conveyance, and this action was dismissed with plaintiff's consent, he was not estopped from bringing suit under the same conveyance, as a mortgage, claiming payment thereunder, and in default of payment, foreclosure and sale: *Nevin v. L. & W. S. Mining Co.*, 10 Col. 357. Where in a former action prosecuted against A and B, to recover from the former the price of property alleged to have been sold to him, no personal claim being asserted against B, the plaintiff failed to recover, and judgment of dismissal was rendered, such judgment did not bar plaintiff from prosecuting a subsequent action against B to recover the price of the property, upon an allegation that the sale was made to him: *Richardson v. Richards*, 36 Minn. 111. Where the supreme court has passed upon the effect of record and documentary evidence in one appeal, and remanded the case for

a new trial, it is not error for the trial court to refuse to submit an issue to be found only on such evidence, when it was declared by the supreme court to be insufficient for that purpose; and the ruling of the supreme court in such case is not *res adjudicata*: *McMillan v. Baker*, 97 N. C. 197. Where a bill was filed, alleging that complainant had received a certain promissory note as a gift from her father, and that it was given for the purchase-money of land in possession of the maker, and praying that he be restrained from disposing of the land, and be required to pay her the money due on the note, that it be a lien upon the land, and that the land be sold for the payment thereof, the dismissal of this bill at the hearing for want of equity did not conclude the complainant, under a bill subsequently filed by her father's administrator, under which the question was, whether she would be charged with the note in the distribution of the estate, she claiming that the note had been given to her by her father during his lifetime: *Walker v. Wyse*, 77 Ga. 234. The dismissal of a party defendant at the instance of the plaintiff, before trial, in a case where no counterclaim has been made, is not a judgment upon the merits, and is not a bar to further proceedings against the dismissed defendant, upon the cause of action stated in the complaint: *James v. Lepout*, 19 Nev. 174. A judgment dismissing an action will not bar another suit founded on the same cause of action, if the first suit was dismissed because the court had no jurisdiction to hear it upon its merits: *Yankey v. Swaney*, 85 Ky. 55.

TEX v. PFLUG.

[24 NEBRASKA, 666.]

STATUTE OF LIMITATIONS. — In ejectment to recover a strip of inclosed land, the fact that defendant had leased from plaintiff's grantor a piece of uninclosed land adjacent to the disputed strip, for a long time prior to the bringing of said action, does not affect the right of the defendant under the statute of limitations, the intent being to lease only the uninclosed tract.

ADVERSE POSSESSION IS ESTABLISHED OVER LAND OF ANOTHER, WHERE THE SAME IS INCLOSED BY MISTAKE, together with defendant's own land, to a surveyed line, and is occupied by him as owner for a longer period than the statutory limit, by actual and uninterrupted possession.

C. A. Baldwin, for the plaintiff in error.

George B. Lake, for the defendant in error.

REESE, C. J. This action was instituted for the recovery of a strip of land occupied by defendant, and which it is alleged is the property of plaintiff. The trial in the district court resulted in a judgment in favor of defendant, and to reverse which plaintiff prosecutes error in this court. The land in dispute is about fifteen feet wide and eighty rods long, and is on the division line between the northeast quarter of the northwest quarter of section 13, township 14, range 12 east, owned

by defendant, and the northwest quarter of the said northwest quarter, owned by plaintiff.

It appears from the bill of exceptions that, in the year 1864, defendant purchased the forty acres owned by him, and soon thereafter took possession of it. The next year, being uncertain as to its boundary lines, he caused the same to be surveyed and inclosed with a fence, the fence being placed upon the boundary lines according to the survey, where it has remained ever since. He immediately began the cultivation of the whole of the ground, and has continued to do so ever since, except that a part of it was planted in forest and fruit trees, and which he has not cultivated by raising crops upon it. The whole has, however, been in his possession, and in cultivation in the manner indicated, for near twenty years next prior to the beginning of the suit. During a part of the time of his residence upon the forty owned by him he has leased the northwest quarter of the northwest quarter of the section (being the forty acres lying immediately west of his) from plaintiff's grantor, and has pastured his stock thereon, and has perhaps cut hay on part of it, although the proof is not clear as to the latter. During all of the time referred to, the land of plaintiff was uncultivated prairie. On the eighth day of August, 1885, plaintiff became the owner, and soon thereafter caused it to be surveyed, and upon such survey the line between the two forties was found to be about fifteen feet east of defendant's fence, and on the land inclosed and occupied by him. Hence this suit for the possession of the strip alleged to be within defendant's inclosure. The defense interposed is the statute of limitations.

It is claimed by plaintiff that defendant is not entitled to the land for two reasons: 1. That having leased plaintiff's land, — which, it is insisted, includes the tract in dispute, — his possession has not been adverse or hostile, and therefore the statute has not run; and 2. That he never at any time intended to claim more than was actually conveyed to him by his grantor, which was the northeast quarter, etc., and the fact that by a mistake his inclosure extended over the line to which he sought to fence, would prevent the running of the statute.

As to the first contention, it is quite clear that in leasing the land now owned by plaintiff it was the purpose to lease only the uncultivated land lying west of defendant's field. This was the purpose of the agents of plaintiff's grantor, as

well as that of defendant. We cannot see, therefore, how the rights of defendant could be affected by the contracts of lease referred to.

As to the second proposition there might be more doubt, as it might be that in case of a mutual mistake as to the location of a partition line the statute of limitations would not interpose a barrier to a recovery to the true line. It is apparent that the decision of the district court was not based upon any consideration of this question, and as, under the testimony, the judgment would have to be affirmed, whatever might be our views upon this point, we will not discuss it.

The testimony of defendant and his witnesses is to the effect that, in 1865, he caused his land to be surveyed and inclosed to the surveyed line; and from that time on he occupied, as owner, to that line, without reference to any other boundary. By his fence and his forest and fruit trees he, for nearly twice the period of the statutory limit, established his boundaries and claimed ownership to them. He testified pointedly to this fact. He took possession to the line fixed by the surveyor, and designated as his boundary by his grantor, and held with reference to it, and to nothing else. This being the view adopted by the district court, and there being sufficient evidence to sustain it, the judgment cannot be molested: *Brown v. Anderson*, 90 Ind. 94; *Bunce v. Bidwell*, 43 Mich. 542; *Seymour, Sabin, & Co. v. Casli*, 31 Minn. 81; *Meyer v. Wigman*, 45 Iowa, 579; *Cole v. Parker*, 70 Mo. 372; *Metcalf v. McCutchan*, 60 Miss. 145.

The judgment of the district court is affirmed.

ADVERSE POSSESSION, NATURE OF, TO SET IN OPERATION THE STATUTE OF LIMITATIONS: *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71, and cases collected in note 74. Possession by mistake in boundary line: *Wood v. Willard*, 37 Vt. 377; 86 Am. Dec. 716; *Yetzer v. Thoman*, 17 Ohio St. 130; 91 Am. Dec. 122; *Russell v. Mileney*, 39 Vt. 579; 94 Am. Dec. 358, and note 362.

LOMBARD v. MAYBERRY.

[24 NEBRASKA, 674.]

LIABILITY OF SURETY ON BOND WHERE PRIOR SIGNATURES OF CO-SURETIES ARE FORGERIES — INSTRUCTIONS. — A surety who signs an obligation after the names of others admits without warranty the genuineness of those signatures, and if the principal's or the co-sureties' names be forged without his knowledge and without complicity of the holder, it is no defense to the surety that he believed such signatures were genuine; and an instruction or inference from the court to the jury that such surety was liable to suffer from a mistaken belief of the genuineness of such signatures is error.

INSTRUCTIONS AS TO PRINCIPAL'S COMPLICITY IN FRAUDULENT EXECUTION OF BOND. — In an action against surety on bond where prior signatures of co-sureties are forged, it is error to charge the jury that if one D. "was found to be acting as agent for the plaintiff (being his attorney at law), and saw the defendant sign the bond, and handed him the pen with which he was to sign it and did sign it, then that the defendant was not legally bound by such bond," since such act in itself is not sufficient to predicate complicity of plaintiff or his attorney in the fraudulent execution of the bond, and is too remote to predicate any such conclusion thereon.

INSTRUCTION IS ERRONEOUS where there is no evidence in the case to which it is applicable; it is also erroneous where, although it states a correct principle of law, yet the language used is inexact, obscure, and therefore misleading.

EVIDENCE. — FOR THE PURPOSE OF FIXING AMOUNT OF RECOVERY IN ACTION ON BOND GUARANTEEING NEGOTIABLE PAPER transferred to plaintiff, it is not necessary, as a condition to the introduction of the notes in evidence, to prove their execution, even if it is denied in the answer.

WITNESS — ANSWER TENDING TO CRIMINATE — WAIVER OF PRIVILEGE. — Where witness in his deposition testifies in chief to execution of certain notes, he does not thereby waive his privilege of refusing to answer on cross-examination, on the ground that his answer might tend to criminate him, as to whether the notes were respectively in the same condition at the time he was testifying as they were when signed and delivered; and it is error in the court in such case to strike out such deposition on the ground that witness had, by so answering in chief, waived his privilege.

MEASURE OF DAMAGES IN ACTION ON BOND GIVEN AS GUARANTY FOR PAYMENT OF COMMERCIAL PAPER sold to plaintiff, where such bond limits the time within which the notes and securities mentioned therein should be paid, and contains a further limitation that the amount of loss or default to be chargeable to the sureties should not exceed five thousand dollars, is the aggregate amount or face value of the negotiable securities delivered to and received by the plaintiff in good faith within the time limited by the terms and conditions of said bond, and remaining unpaid at the time of the commencement of the suit, not exceeding in the aggregate the sum of five thousand dollars, with interest.

S. P. Davidson, for the plaintiff in error.

E. W. Trites and A. M. Applegate, for the defendants in error.

COBB, J. The plaintiff in error brought this action in the district court of Johnson County, alleging that on May 26, 1884, the defendants in error, Wallace S. Smith as principal, and Phineas Jones, Almeron Reed, E. W. Smith, Moses Roberts, and Charles N. Mayberry as sureties, executed their bond to the plaintiff in five thousand dollars, guaranteeing the payment at maturity of the several notes and negotiable securities (forty-one in number) sold by Wallace S. Smith to the plaintiff, and guaranteed to be paid to the plaintiff at maturity at his office in Lincoln, Nebraska; and if not paid at maturity by the makers, or if received by said Smith, and not paid to the plaintiff, or if in the hands of said Smith, at the date of said bond, and not paid to the plaintiff, the principal and sureties were to pay the same within thirty days from the date of the bond; and if not paid to said Smith, nor yet due, to pay the said notes and negotiable securities within thirty days from maturity respectively. It is admitted that said Smith, during the year commencing June 1, 1883, had been engaged, as a business, in "taking, buying, and selling to the plaintiff notes and negotiable securities," and had, at the date of the bond, sold to him an amount of \$9,750.12, remaining unpaid, and to which the bond was applicable as security; that it was security for the notes negotiated by said Smith, and also to give him credit, to close up his last year's business, and to better enable him to make sale of such securities.

It is alleged that said Smith as principal, and Phineas Jones, Almeron Reed, James H. Seay, and Charles N. Mayberry as sureties, had, on April 3, 1883, executed a prior bond to plaintiff in five thousand dollars, guaranteeing all the notes and negotiable securities sold by said Smith to the plaintiff prior to June 1, 1884, which bond was subsequently canceled in consideration of the second bond, on which this action is brought, and which is limited to the securities then held, or those that might be taken in lieu of other securities, necessary to close up the business prior to June 1, 1885.

It is alleged that, after the execution of the second bond, on which this suit is brought, said Smith proceeded in the closing up of his business, until his sureties requested the same to be stopped; that on the execution of the bond, the plaintiff relied upon it as a guaranty of the securities, and the ability of the makers; by which the sums then in the hands of said Smith and not paid over to the plaintiff were allowed to run the thirty days mentioned in the bond.

It is alleged that, at the date of the bond, and of the aggregate of the securities so purchased and held by the plaintiff, \$965.94 was then in the hands of said Smith, of which \$600, and no more, was subsequently paid; that of the sum of \$9,750.12, the aggregate of the securities held by the plaintiff at the date of said bond, all had been due then more than thirty days, on which not more than \$3,200 had been paid to the plaintiff, leaving \$5,755.94, of which more than \$5,000 was past due for more than thirty days at the bringing of this suit. A description of the notes and securities is set forth, being forty-one in number, as well as those collected by said Smith and not paid over to the plaintiff, on which the balance due is \$365.94.

It is further alleged that the sureties on said bond received from said Smith money and property, as indemnity, amounting to \$2,200, which they still hold as security; and that there is now due the plaintiff, on said notes and negotiable securities, \$5,755.94, and interest, at the commencement of this suit \$275, for which judgment is asked against defendants Reed, Roberts, and Mayberry, in the sum of \$5,000, with interest from July 12, 1884, and costs.

The defendants Reed, Roberts, and Mayberry answered and denied the allegations that they executed the bonds dated May 26, 1884, and April 3, 1883; that the promissory notes were executed by the makers, or that they were negotiated by said Smith; that said Smith ever collected or had in his hands any money that should have been paid to said plaintiff; and they aver that if the defendant Mayberry signed the bond sued on, his signature was obtained by the fraudulent representations of the plaintiff, or his agents, that the signatures to the bond above said Mayberry's were genuine, whereas they were forged, and that said Smith at the date of the bond of May 26, 1884, was a defaulter, and had embezzled money and property of the plaintiff, which the plaintiff knew, but concealed the fact, in order to induce the defendant Mayberry to sign said bond, which was without consideration to said Smith, or to the defendant Mayberry.

The plaintiff joined the issues, denying each allegation of the defendant's answer. There was a trial to a jury, and a verdict for defendants.

The court in its discretion submitted three special findings to the jury: 1. Did defendant Almeron Reed sign the bond sued on? 2. Did defendant Moses Roberts sign the bond sued

on? 3. When defendant Mayberry signed the bond in suit, did he believe the names of defendants Reed and Roberts to be their genuine signatures to the bond?

The jury found the first and second in the negative, and the third in the affirmative.

The plaintiff filed a motion for a new trial as to Mayberry, which was overruled, and judgment rendered on the verdict, to which exceptions were taken, and errors assigned, as follows: 1. The verdict is contrary to the evidence; 2. The verdict is contrary to law; 3. For errors of law occurring at the trial; 4. For errors in sustaining defendants' objections to plaintiff's evidence; 5. For errors in sustaining defendants' objections to each of the notes offered in evidence by plaintiff, except the Greenfield and Cavin notes; 6. For error in refusing to exclude that portion of witness Davidson's cross-examination as to the signatures of the Minkler notes; 7. For error in overruling plaintiff's objections to improper evidence of defendants; 8. For refusing instructions of plaintiff, Nos. 5 and 6; 9. For refusing and changing instruction of plaintiff, No. 4; 10. In giving instruction of defendants, No. 1; 11. In giving instruction of defendants, No. 2; 12. In giving instructions of defendants, No. 3; 13. In giving each of the court's own instructions; 14. In sustaining the defendants' motion to strike out witness Smith's deposition as to the notes identified therein; 15. For indiscretion preventing a fair trial; 16. In submitting special finding No. 3.

The plaintiff's motion for a new trial being overruled and a judgment rendered on the verdict, the plaintiff brings the cause to this court on error. His assignments of error being substantially the same as the causes assigned in his motion for a new trial, it is deemed unnecessary to set them forth.

The issues to be tried were the validity of the bond, and the liability of the sureties under it. For this purpose the plaintiff's agent and actuary, West, testified that prior to April 3, 1883, they were buying notes of the defendant Smith, to an amount, currently, of seven to ten thousand dollars; that they took the bond of that date, running to June 1, 1884, to guarantee the payment of the notes discounted; that a great many notes were taken under it, and that the signatures of Smith and Mayberry to that bond were genuine; that on an investigation of Smith's accounts with plaintiff, May 15, 1884, his indebtedness for collections, not paid over, was found to be \$965, and the amount of discounts then carried

was \$9,750.12, for which the bond in controversy was executed May 26, 1884, in lieu of the former bond, which was to be canceled; and that the signatures of Smith and Mayberry to the latter bond were genuine.

In reply to the question, to describe the circumstances of taking the bond of May 26, 1884, the witness testified that "Mayberry, one of the sureties, came up to Lincoln and informed us that Smith was involved; that he was behind with the school fund and other matters, and wanted to know how his affairs stood with us. At his request I went back with him to Tecumseh, May 14th, and had an investigation of Smith's accounts. At that time it appeared he owed us about \$965, notes collected and not accounted for, and had in his hand notes due and not collected, and others, coming due, sent him for collection. We found his affairs in such shape we did not think it safe to leave them with him. I took the notes away, and left them with Russell and Holmes, with instructions to turn them over to Smith as soon as he collected and paid the money into bank for us. A great deal of consultation was had between Mayberry, Smith, and myself as to permitting Smith to go on and close up the business, or taking it out of his hands entirely. I urged Mayberry to take charge of it, but he declined. It was finally agreed that, as the bond under which Smith was acting would expire June 1st,—this was then May 15th,—if he gave a new and satisfactory bond, and if his bondsmen were satisfied to go on and close up the business, we would consent to it. I went home, leaving affairs in that condition. He was to pay the \$965 in a few days. He prepared a bond, which he sent to us, which was not satisfactory, from defects in the body. There were blanks for signatures, and the names of some of the signers were not written in, and for various reasons it was rejected. We prepared a bond, and sent it to Mr. Davidson, which is the bond returned to us, executed May 26, 1884. We had a good many consultations with Mayberry, subsequently, up to the time of Smith's arrest. At Mayberry's suggestion and agreement, the notes were left with Mr. Davidson, in Tecumseh, and witness wrote to Russell and Holmes to turn over the notes in their hands, to be turned over to Smith when due, as fast as Davidson thought to be safe. We did not want him to have too many at once, and yet wanted him to have those coming due, necessary to collect."

S. P. Davidson testified that, shortly after the 15th of May,

1884, the plaintiff's agent sent him the bond in question, which was handed to Smith for the signatures of his sureties; that several days afterwards Smith returned the bond with the signatures of the makers, just as they now are. The witness sent it, by the first mail, in its present condition, to the plaintiff.

Charles N. Mayberry testified that, prior to May, 1884, he has been intimately acquainted with his co-defendant, Smith, for fifteen years; that his own name on the bond in question was his signature.

On cross-examination, in reply to the question, "When and under what circumstances did you sign your name there?" the witness answered that "he signed it in Mr. Davidson's office, about the time of the date of the bond."

Q. Who handed you the bond, and who handed you the pen and ink with which you signed it? A. Smith handed me the bond, and Judge Davidson handed me the pen.

Q. Was there anything said about the bond, or any examination made of it, by the parties there at the time? A. I examined the bond, and I don't think there was anything said. Judge Davidson, if I remember, put the blotter on the bond, and then folded it up, and put it away. I think it was in the same condition as it is now.

This is the weight of evidence of the relationship and concern of the parties to each other, and to the final execution of the bond.

It does not seem important to treat separately each of the errors assigned by the plaintiff at the trial.

The court charged the jury, at the request of the defendants, that if they found from the evidence that defendant Mayberry signed the bond sued on after the names of defendants Roberts and Reed appeared thereon, as obligors, and that defendant Mayberry believed that such signatures were genuine, but that such signatures were really forgeries, and if they further found that Mr. Davidson was then acting as agent for the plaintiff, and saw Mayberry sign such bond, and handed him the pen with which he was to sign the same, and did sign the same, then Mayberry is not legally bound by such bond.

To this instruction, the plaintiff excepts in the eleventh assignment.

It does not appear that the defendant Mayberry was either ignorant or ill-advised of the character of his principal, and of his business transactions, but the evidence is, that he was

thoroughly acquainted with both. It was his privilege and opportunity to have made due investigation of the genuineness of the signatures. He examined the bond, and signed it without the superinducement of the plaintiff or his agent, and without condition as to the signatures of others. It was primarily on his suggestion and interposition that the bond was taken, to supersede the former one on which he was a surety. Therefore, it would seem that an instruction or inference from the court to the jury, that he was liable to suffer from a mistaken belief of the genuine signatures of his co-sureties, may be deemed to have been prejudicial to the plaintiff, and to have deprived him of a fair trial. That Mayberry was not liable as a surety, under his mistaken belief, is not an accepted rule of law to warrant the plain charge of the court. The contract of the surety is to be strictly construed, and his liability would seem to be equal to that of the principal in this guaranty, and not less. The surety who signs an obligation, after the names of others, admits, without warranty, the genuineness of those signatures, and if the principal's or the co-sureties' names be forged without his knowledge, and without complicity of the holder, it is no defense to the surety that "he believed that such signatures were genuine." So that, if this rule be maintained by sufficient authority, the defendant Mayberry is indebted to the plaintiff, as the *bona fide* holder of the bond, though the names of Roberts and Reed were forged to it.

In the case of *Selser v. Brock*, 3 Ohio St. 302, it was held that where a fraud was practiced by a principal debtor in procuring a surety to sign a note, without the knowledge of the creditor, the obligation of the surety was valid and binding; and further, that a surety who had signed his name to a promissory note after the names of others in effect affirmed the genuineness of the previous signatures, and could not avoid his liability by showing that they had been forged by the principal, but of which the creditor had no knowledge.

This precedent is wholly analogous to the case before us. It was affirmed in a later decision of *Bigelow v. Comegys*, 5 Ohio St. 256, wherein it was held that the surety on a replevin bond could not set up the defense that he was induced to sign the bond upon the fraudulent representation of the principals that a co-surety, who was responsible, had already signed it, when in fact his signature was a forgery.

The doctrine of the rule was thoroughly considered in the case of *Helms v. Wayne Agricultural Society*, 73 Ind. 325, 38

Am. Rep. 147, where the instructions to the jury were considered to have expressed the true rule in the proposition, that "when the name of one of two or more obligors in a bond, note, or other writing obligatory had been forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee or obligee accepted the instrument without notice of the forgery." This, then, is the law to be applied to the case at bar. It corrects the instructions as to the belief of the defendant, and as to the forging of the names of co-defendants, and holds the makers of the bonds to be liable to the plaintiff. It is supported directly, and in principle, by abundant authorities not important to further analyze in this opinion: *Veazie v. Willis*, 6 Gray, 90; *York Co. M. F. Ins. Co. v. Brooks*, 51 Me. 508; *Franklin Bank v. Stevens*, 39 Id. 532; *Chase v. Hathorn*, 61 Id. 505; *Stoner v. Milliken*, 85 Ill. 218; *Hagar v. Mounts*, 3 Blackf. 57; *Harter v. Moore*, 5 Id. 367; *Carr v. Moore*, 2 Ind. 602; *State v. Van Pelt*, 1 Id. 304; *Deardorff v. Foresman*, 24 Id. 481; *State v. Pepper*, 31 Id. 76; *Craig v. Hobbs*, 44 Id. 363.

The second clause of the instruction to the jury, "that if Mr. Davidson was found to be acting as agent for the plaintiff, (being his attorney at law), and saw the defendant sign the bond, and handed him the pen with which he was to sign it and did sign it, then that the defendant Mayberry was not legally bound by such bond," is not a tenable proposition, but one that ought not to have been given in charge, and is of itself erroneous and misleading.

That the act of courtesy charged, under the facts in evidence, could be deemed sufficient to predicate the complicity of the plaintiff or his attorney, in the fraudulent execution of the bond, seems too remote and apocryphal for more serious consideration than the brief and emphatic overruling of the insinuation.

The court also charged, that "the acts and knowledge of the agents and attorneys of plaintiff that he had intrusted with the management of the business, which is the basis of the liability claimed in said bond, are the acts and knowledge of the principal, unless it shall be shown by the evidence that such agents and attorneys act without the authority of the principal"; also that if they should "find from the evidence that the plaintiff, by his agent, Mr. Davidson, showed the bond sued on in this case to defendant Mayberry, and handed him the

pen for the purpose of having him sign the same, and also that the bond then had the signatures of the other defendants thereon, as obligors, and that Mayberry then believed such signatures to be genuine, and signed his name thereto on the face of such belief, then if they found from the evidence that the signatures on said bond of defendants Roberts and Reed were forgeries, and that fact was not known to Mayberry, then defendant Mayberry is not legally bound by such bond."

In addition to what is said above in regard to that part of the charge then under consideration, and which is also applicable to that part of it which is here quoted, it is also deemed to be erroneous and misleading, for the reason that there is no evidence in the case to which it is applicable. There is no evidence that "the plaintiff, by his agent, Mr. Davidson, showed the bond sued on in this case to defendant Mayberry," nor of any "acts and knowledge of the agents and attorneys of plaintiff that he had intrusted with the management of the business, which is the basis of the liability claimed in said bond." Moreover, even if it be conceded that the principle of law sought to be laid down in the clause of the charge last referred to is correct, the language used is inexact and obscure, and therefore misleading.

In that part of the charge given by the court on its own motion is found the following, being a part of No. 2: "In order to find damages for failure to pay notes, the evidence must satisfy you that there were such valid notes. This will not be elaborated here, because covered by other instructions, but this much is said, to be taken in connection with what is said in instructions given at the request of the parties, that you may not be misled as to what is meant by the use of the word 'note.'"

This instruction, like those first above referred to, is misleading, in that it is inapplicable to the evidence in the case. There is evidence that the bond sued on was given as a guaranty or security for the payment of certain commercial paper, which had been transferred by W. S. Smith to the plaintiff. These were the only notes in the case. The transfer of these notes by Smith to the plaintiff, as well as their identification as the paper intended to be secured and guaranteed by the bond sued on, was sufficiently proven by the testimony of the witness Charles West. I do not understand the law to be that it was incumbent upon the plaintiff to prove the execution of these notes, although such execution is

denied in the answer. The bond sued on contains the following clause: "It being expressly understood and agreed by the parties to this undertaking that the said Wallace S. Smith has, during the year commencing June 1, 1883, been engaged in buying, taking, and selling to said Lombard and assigns negotiable securities, and has sold to said Lombard negotiable securities amounting to \$9,750.12, and intends to continue in the business of buying and selling negotiable securities, and that this undertaking of guaranty is intended to apply to all securities heretofore as well as hereafter negotiated to said B. Lombard, Jr., or through his financial agency, by said Wallace S. Smith, whether such securities now exist or are hereafter made, and is for the purpose of giving said Wallace S. Smith credit, and securing to him an opportunity to close up said last year's business, and collect himself said securities so sold, for said Lombard, and giving said Smith in his business good standing, character, and credit, to enable him the better to conduct his business and obtain sale of securities, and the surety guarantors hereby each severally waive notice from said B. Lombard, Jr., of the purchase or receipt by him from said Wallace S. Smith of securities, and of the description and amount, and the non-payment from time to time negotiated, except as they may especially request and inquire information thereof."

I will repeat that the identity of the notes produced on trial as securities purchased or received by the plaintiff from said Wallace S. Smith, within the time covered by the terms of said bond, and remaining unpaid, the aggregate amount thereof being within the limit expressed in said bond, to wit, five thousand dollars, was all the proof required in that behalf.

But if I am wrong in the above proposition of law, and if it were necessary that the execution of said notes be proved by the plaintiff, it would then become relevant to examine the plaintiff's fourth assignment of error, to wit, the excluding of proper evidence offered by plaintiff.

On the trial the plaintiff offered in evidence the deposition of Wallace S. Smith, taken on his behalf, which was admitted. This deposition was taken at the penitentiary, the witness being there confined pursuant to a conviction and sentence for felony. The witness, upon his examination in chief, among other things, testified being shown the several notes involved in the controversy, and which had been identified by the

witness Charles West, as hereinbefore stated, as the securities purchased from Smith by the plaintiff, and as coming within the guaranty of the bond, and interrogated as to whether he was acquainted with the signatures of the signers of the same, and whether or not the said notes were signed in his presence by the persons whose names appeared as the signers thereof. In each case the witness answered that the note was signed in his presence by the person whose name appeared as the maker thereof; that he was acquainted with such signature, and that it was genuine. Upon his cross-examination the witness was asked as to each note which he had testified had been signed by the maker thereof,—if it was signed and delivered by the maker in the same condition in which it was at the time of testifying. To which question the plaintiff objected, as not being proper cross-examination, and for the further reason that the answer sought is intended to criminate the witness, and that he had a right to object to it for that reason. Whereupon the witness in each case refused to answer.

Upon the trial, and near the close thereof, the defendants moved to “strike out the deposition of W. S. Smith, as far as it affects the signatures and goes to show the execution of these notes offered in evidence, for the reason that the witness refuses to be cross-examined on the execution of the notes.” Which motion was sustained as to all but the Cavin and Greenfield notes. Thereupon the plaintiff offered in evidence the several notes above referred to, to which offer the defendants “objected to each of the said notes as immaterial, incompetent, and irrelevant, the signatures of each being denied, and not proven,”—which objection was sustained as to each.

Counsel for defendants in error, in their brief, urge in defense of the above ruling of the trial court, that the witness, having testified upon his examination in chief that the signatures to the notes were genuine, thereby waived his privilege to refuse to answer the cross-question whether the notes, respectively, were, at the time the signatures were placed upon them, in the same condition that they were at the time of testifying, on the ground that his answer to the latter question might tend to criminate him. To this they cite *Rapalje on the Law of Witnesses*, 443; *Wharton's Criminal Evidence*, 432; *Comp. Stats.* 1885, sec. 339, p. 673. The author first named, at the page cited, states the law as follows:—

"The privilege being a purely personal one, the witness may waive it and answer at his peril. From the nature of the right it may be inferred that he will be at liberty to answer any question at his discretion; and that his consenting to answer some questions ought not to bar his right to demur to others. Such is the English rule, subject perhaps to the qualification that he should not be allowed, by any arbitrary use of his privilege, to make a partial statement of facts to the prejudice of either party. The general American rule is the other way, i. e., if he voluntarily discloses a part of a transaction or conversation tending to criminate him, he waives his privilege, and must answer freely and disclose the whole transaction or conversation, unless the partial disclosure is made under an innocent mistake, or does not clearly relate to the transaction as to which he refuses to testify."

The citation from Wharton, I must say, with due respect to counsel making it, is not applicable to the case at bar.

It is the theory of the defense that the notes above referred to, after having been executed and delivered to Wallace S. Smith by the parties whose names they bear, were by Smith raised or altered so as to represent other and greater sums or amounts, and they contend that having, when placed on the stand as a witness, testified as to the making or signing of the notes by the makers, he could not refuse to testify as to their alteration on the grounds that such testimony might tend to criminate himself.

Let us apply the law as laid down in the work cited as above quoted, and see if this position can be sustained. The making and delivery of the notes by the makers was, in each case, a transaction complete in itself. If the amount of the note was raised or altered in the presence of the maker and as a part of the same transaction, then it was an act entirely innocent in itself, and could form the basis of no contention on the part of the makers, nor of any one else. But that is not the position of the defendants. The theory upon which they sought to cross-examine the witness as to the alteration of the "condition" of the notes is, that after their signing and delivery by the makers thereof, at another time, not necessarily at the same place and as a different and separate transaction, they were altered, raised, and their "condition" changed. The witness, having submitted to testify as to the signing of the notes, could not, under the American rule as above stated,

have refused upon his cross-examination to answer any question as to the time, place, or other matter, being a part of that transaction; but when it was sought to enter upon the investigation of another and distinctly separate transaction by questions, the answers to which would tend to criminate him, could he not, under the rule, refuse to answer? That proposition seems clear.

The section of statute cited lays down the rule substantially the same as it is stated by the author whom we have quoted, and the statute supports the proposition.

As herein before indicated, I doubt the necessity, on the part of the plaintiff, to prove the execution of the notes as a condition to their introduction in evidence for the purpose of fixing the amount due on the bond; but if such proof was necessary, then the court erred in suppressing the deposition under the consideration.

Having reached the conclusion that the true measure of damages in this case is the aggregate amount or face value of the negotiable securities delivered to the plaintiff by the said Wallace S. Smith, and received by the plaintiff in good faith within the time limited by the terms and conditions of said bond, and remaining unpaid at the time of the commencement of the suit, and not exceeding in the aggregate the sum of five thousand dollars, with interest, the alleged error on the part of the trial court, in refusing to instruct the jury to consider in their verdict the amount of certain property claimed to have been placed by the defendant Wallace S. Smith in the hands of his co-defendant, Mayberry, as an indemnity for his liability on said bond, will not be examined.

The judgment of the district court is reversed, and the cause remanded to that court for further proceedings in accordance with law.

LIABILITY OF SURETY WHEN THE NAME OF THE PRINCIPAL OR ANOTHER SURETY IS FORGED. — It is held in *Hall v. Smith*, 14 Bush, 604, that one who signs as surety guarantees that the prior signatures are genuine, although it may transpire that one or more of said signatures of the co-sureties are forged; that a presumption attaches in favor of the obligee that the genuine signature would not have been given had the prior ones been forgeries, and the affixing such genuine signature binds the surety who signs; and his belief that the forged name was genuine does not lessen his responsibility: *Stern v. People*, 102 Ill. 540. The basis of such responsibility depends, however, upon the fact that the obligee has acted in good faith, that there was nothing upon the paper to indicate the character of the prior signatures, and that in such case neither the obligee nor the obligor stand relatively in the position to say that he was misled or deceived by the other, and that there is

no reason for discharging the surety and giving the obligee nothing: *Helms v. Wayne Agricultural Society*, 73 Ind. 325; 38 Am. Rep. 147; also cited in the principal case; *State ex rel. Brown v. Baker*, 64 Mo. 167; 27 Am. Rep. 214. In the last case the defendant signed an official bond as surety on the representation that another surety whose signature appeared thereon had actually signed it, but that signature was in fact a forgery, and the person whose name had been forged did not communicate the fact to the defendant, and the obligee was ignorant of the condition on which the defendant had signed, and it was decided that the defendant was liable; and in *Mathis v. Morgan*, 72 Ga. 517, 53 Am. Rep. 847, the bond was given to the state as security for a bank depository, and the signature of the surety preceded that of the forged signature, the name of the same person, together with that of another surety whose name appeared before that of the complaining surety in the bond, was forged to an affidavit that they were worth a certain sum of money. The bond was subsequently delivered to the governor of the state, who was the obligee, and the complaining surety was held liable, there being nothing to put the obligee on inquiry or notice, since everything on the face of the paper appeared genuine. But where it was one of the conditions of the delivery that a certain named party should execute the bond, and none other than his forged signature was obtained thereto, it was decided that the omission to procure the genuine signature or his assent to the execution of the bond placed the complaining surety in the same position as if he had never executed the bond, and that the bond was void as to him: *Linn County etc. v. Farris*, 52 Mo. 75; see also Brandt on Suretyship and Guaranty, sec. 358; Colebrooke on Collateral Securities, sec. 205. The principle underlying the decision in the case of *Linn County etc. v. Farris*, *supra*, conflicts with that given in *Nash v. Fugate*, 32 Gratt. 595, where it is held that notice of the condition must be brought home to the obligee or the surety is not discharged. In this latter case, however, the question of forgery did not arise; see also, upon the principle involved, *Brown v. Kent County*, 42 Mich. 501; *Washington Probate Court v. St. Clair*, 52 Vt. 24; *Guild v. St. Thomas*, 54 Ala. 414; 25 Am. Rep. 703; *Allen v. Marney*, 65 Ind. 398; 32 Am. Rep. 73. In addition to the authorities already cited herein, and those noted in the principal case on the point under consideration, examine *Selser v. Brock*, 3 Ohio St. 302; *Bigelow v. Comegys*, 5 Id. 256; *Chamberlin v. Brower*, 3 Bush, 561; *Pepper v. State*, 22 Ind. 399; *Wayne etc. Society v. Cordwell*, 73 Ind. 555.

REED v. MORTON.

[24 NEBRASKA, 760.]

WIFE WILL BE BOUND WHERE SHE EXECUTES DEED OF REAL ESTATE IN BLANK as to grantee, date, or amount of consideration, and delivers it to her husband under circumstances which imply authority in him or such person as he may authorize to fill out said blanks; especially so, where she afterwards, with full knowledge of the fact, receives and uses the money arising from a sale of the land to a *bona fide* grantee.

S. H. Sornborger, for the appellant.

N. H. Bell and G. W. Sampson, for the appellees.

MAXWELL, J. This is an action brought by the plaintiff to quiet the title of certain real estate in Saunders County, of which she claims to be the owner.

The defendant in his answer alleges, "that on or about the twentieth day of August, 1881, he purchased from the plaintiff, Lottie G. Reed, and E. O. Reed, her husband, the lands mentioned and described in the plaintiff's petition, for the sum of nine hundred dollars in cash, which said sum defendant duly paid therefor; that at the time of said purchase as aforesaid, and the payment of the said nine hundred dollars, plaintiff and E. O. Reed delivered to this defendant their deed of general warranty to said lands, duly signed and acknowledged, and defendant took possession of said lands; that at the time of the purchase of said lands by this defendant, the same was raw, uncultivated prairie land, without improvements of any kind, and were not worth to exceed the sum of nine hundred dollars, which was a reasonable and fair price therefor; that prior to the time of the purchase of said lands above described, and during negotiations for the purchase of said lands by this defendant, the said O. E. Reed, as agent for plaintiff, was conducting negotiations, and exhibited to the defendant a deed of conveyance, duly signed and acknowledged, containing the usual covenants of warranty, and complete in all respects, except the name of grantee, the date of signing, and the amount of consideration, and that at said time, and for a long time prior thereto, the said E. O. Reed, as agent for Lottie G. Reed, transacted all her business, and negotiated the purchase of said lands, apparently having full and complete authority in the premises; and that at the time of the purchase of said land, and the payment of the consideration of nine hundred dollars therefor, the deed delivered to this defendant was signed by the grantors, Lottie G. Reed and Elias O. Reed, duly acknowledged by them, and was a perfect and regular deed in all respects.

"Defendant further says that, subsequent to the execution and delivery of the deed and the payment of the nine hundred dollars as hereinbefore set forth, and about September, 1881, the plaintiff removed and became a resident of Wahoo, Saunders County, Nebraska, where she continued to reside and do business until about November, 1883. During all the time plaintiff so resided in Wahoo, as aforesaid, this defendant was in the continuous and exclusive possession of the land herein-

before described, paid all the taxes against said land, and made lasting and valuable improvements thereon.

"Defendant avers that plaintiff had full knowledge of all the facts aforesaid, and permitted defendant to expend large sums of money in the improvement of said lands, and made no objection to his so doing, nor any claim whatever to said land, but has received and accepted the proceeds of the same thereof, as hereinbefore set forth, and has ever since kept and retained the same, and has not at any time offered to restore the purchase price of said land to this defendant, or any part thereof; and defendant avers that the plaintiff, knowing all the facts in relation to the sale of said land, the execution and delivery of the deed, the occupancy of said land, as aforesaid, and having accepted the purchase price of said land, and repeatedly acknowledged herself satisfied with the sale, is now in equity estopped from claiming any interest in or to the said land."

On the trial of the cause in the court below, judgment was rendered in favor of the defendant, and the action dismissed. The plaintiff appeals.

The testimony tends to show that, in the year 1879, the plaintiff was the wife of Elias O. Reed; that at that time they were conducting a drug-store in the state of Illinois. In that year, E. O. Reed came to Saunders County in this state, and purchased the land in controversy, taking the title in the name of his wife, — the plaintiff. He then returned to Illinois. In the spring of 1881, the plaintiff and her husband were conducting a drug-store in Illinois, the business being carried on in the name of the wife, and she, being desirous of visiting one of the southern states, went with her husband before a notary public, and there acknowledged a deed for the conveyance of real estate, the amount of consideration, name of the grantee, and date being left blank. This deed she delivered to her husband, as is claimed, for the purpose of passing the title to this land. Soon afterwards, the husband sold the land in question to the defendant for the sum of one thousand dollars cash in hand, and thereupon he filled up the blanks, and delivered the deed to the defendant. In the autumn of 1881, the plaintiff and her husband removed to Wahoo, in this state, and there opened a drug-store, which was conducted in her name. She denies having any knowledge of the sale of the land prior to her arrival at Wahoo; but the testimony all shows that she was informed of that fact soon after her arrival. There is also a

considerable amount of testimony tending to show that a large part or all of the consideration for the land was used by her in carrying on the drug business in Wahoo. The testimony tends to show that she made admission of that fact during the first year of her residence in that city; and in her testimony she does not deny having made such statements, but says in substance that she does not remember. This is very far from denying the statements imputed to her. If she used any of this money with knowledge that it was derived from the sale of this land, she thereby ratified the sale. In addition to this, where a wife executes a deed in blank as to the grantee, etc., and delivers it to her husband, under circumstances which imply authority in him or such person as he may authorize to insert the name of the grantee, etc., therein, she will be bound thereby. So of the date or amount of consideration: *Inhabitants etc. v. Huntress*, 53 Me. 89; *Cooper v. Page*, 62 Id. 194; *Devin v. Himer*, 29 Iowa, 297; *Field v. Stagg*, 52 Mo. 534; 14 Am. Rep. 435; *Van Etten v. Evenson*, 28 Wis. 33; 9 Am. Rep. 486; *Sebintz v. McManamy*, 33 Wis. 299.

In any view of the case, therefore, the judgment of the court below is right, and is affirmed.

CONVEYANCE BY A MARRIED WOMAN must be executed in the precise form prescribed by statute: *Williams v. Cudd*, 26 S. C. 213; 4 Am. St. Rep. 714, and note 718.

WHEN A GRANTOR SIGNS AND SEALS A DEED, leaving unfilled blanks, and gives it to an agent with authority to fill the blanks, and deliver it, and the agent fills the blanks as authorized, and delivers it to an innocent grantee without knowledge, the grantor is estopped to deny that the deed as delivered was his deed: *Phelps v. Sullivan*, 140 Mass. 36; 54 Am. Rep. 442; and to the same effect is *Campbell v. Smith*, 71 N. Y. 26; 27 Am. Rep. 5; *Swartz v. Ballou*, 47 Iowa, 188; 29 Am. Rep. 470; *Inhabitants etc. v. Huntress*, 53 Me. 89; 87 Am. Dec. 535; *contra*, *Upton v. Archer*, 41 Cal. 85; 10 Am. Rep. 266.

CASES
IN THE
SUPREME COURT
OF
OREGON.

POWELL v. DAYTON ETC. R. R. Co.

[16 OREGON, 23.]

LESSEE IS UNDER OBLIGATION TO USE THE LEASED PREMISES IN PROPER AND TENANTABLE MANNER, and not to expose the buildings to ruin or waste by acts of commission or omission.

TENANT HAVING, BY THE TERMS OF HIS LEASE, THE PRIVILEGE OF PURCHASING THE PREMISES, remains, until such privilege has been availed of, a mere tenant, subject to the same obligations as other tenants, and answerable for any waste committed by him; but his liability to suit for waste is suspended until it is known whether or not he will avail himself of his privilege. Hence, the statute of limitations will not commence to run in his favor against an action for waste until the termination of his tenancy, or until it is otherwise known that he will not become a purchaser under the privilege given him in such lease.

LESSEE IS ANSWERABLE TO LESSOR FOR WASTE, BY WHOMSOEVER COMMITTED, and may have his action over against the wrong-doer.

LESSEE IS ANSWERABLE FOR WASTE COMMITTED BY A RECEIVER OF ITS PROPERTY, for whose appointment the lessor was in no way responsible.

ELECTION TO SUE ON A CONTRACT TO PURCHASE REALTY will not preclude the plaintiff from suing for damages for waste committed on the same property by the defendant while a lessee thereof, if the plaintiff had no cause of action, and failed in the first suit because the defendant had never elected to purchase the property. There can be no election unless concurrent remedies exist between which the plaintiff had the right to elect.

Whalley, Bronough, and Northup, for the appellant.

James K. Kelly, for the respondent.

LORD, C. J. This is an action to recover damages for waste. The defendant went into possession of the described premises under the following instrument:—

"That said Powell hath and doth hereby let and lease to the said railroad company his warehouse property, together with all the rights, privileges, and appurtenances thereunto belonging, situated in the town of Dayton, Yamhill County, Oregon, and more particularly described as follows: Lots Nos. five (5) and six (6), and lots Nos. thirty (30), thirty-one (31), thirty-two (32), and thirty-three (33), in the — of said town of Dayton, as laid out and recorded by Joel Palmer and Andrew Smith, to have and to hold the same for the sole use and benefit of said railroad company for the term of five years, commencing with July 1, 1878, on the following terms, to wit: The said railroad company shall and doth hereby contract and agree to pay the said W. S. Powell for the rent and use of said lots, warehouse, and the streets between said lots, together with the frontage of said lots on the Yamhill River (all of which is hereby included in this contract), the sum of fifty-five dollars (\$55) per month, in United States gold coin; and shall further and doth hereby contract and agree to purchase of said Powell, and pay the said Powell, on or before the expiration of the said term of five years, the sum of five thousand five hundred dollars, in United States gold coin, for all the said described warehouse property, lots, right to said street, river frontage, etc., owned by said Powell as aforesaid; and on the said payment by the said company, its associates, successors, or assigns, to the said Powell, his executors, assigns, or legal representatives, the said sum of five thousand five hundred dollars, the said Powell contracts and agrees to make and deliver to said company, or its legal representatives herein, a good and sufficient deed, in fee-simple, for said property. And for the faithful performance of this contract, the parties here bind their successors, heirs, assigns, and legal representatives.

"In witness whereof we have hereunto set our seals, and the signatures of said Powell, and the officers of said company.

"W. S. POWELL, [SEAL]

"THE DAYTON, SHERIDAN, AND GRAND RONDE RAILROAD.

"By ELLIS G. HUGHES, President. [SEAL]

"THE DAYTON, SHERIDAN, AND GRAND RONDE RAILROAD.

"By F. E. BEACH, Secretary." [SEAL]

The complaint is based on an alleged failure of the defendant to make tenantable repairs, and for voluntary and permissive waste. The defendant denied this, and set up five separate and further defenses, in substance as follows: 1. That it was

dissolved and ceased to exist as a corporation on the 2d of June, 1879, and hence could not be sued at the time this action was brought; 2. That the acts of negligence alleged were barred by the statute of limitations; 3. That the said acts of negligence occurred while the property was in the possession of a receiver of the United States court, and hence, that the defendant was not responsible therefor; 4. That all the damage alleged was the result of inevitable accident; 5. That the whole matter was barred by the former action, or by an election of remedies. Upon issue being joined, a trial was had, which resulted in a verdict and judgment for the plaintiff. At the outset, it may be observed that the instrument referred to contained two distinct and several agreements, namely, a lease of and a contract for the sale of the described premises.

For present purposes, it is sufficient to say, by its terms, the defendant could put an end to the lease under which he took possession at any time during the term, or at its expiration, by exercising its right to purchase the demised premises, and hence, whether the relation of landlord and tenant should continue during such term, when the alleged waste occurred, depended upon the option or choice of the defendant. In all leases there are implied covenants, unless expressly excluded. These implied covenants form as much a part and parcel of the contract as if actually written or incorporated therein. When the effect of a contract is to invest a party with a legal right, such right exists as much for his benefit and protection as if expressly stipulated. The law implies an obligation on the part of the tenant to use the premises leased in a proper and tenantable manner, and not to expose the buildings to ruin or waste by acts of omission or commission. "But in every lease there is," said Mr. Chief Justice Waite, "unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to use the property as not unnecessarily to injure it"; or, as it is stated by Mr. Comyn, "to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the willful or negligent conduct of the lessee": Comyns on Landlord and Tenant, 188. This implied obligation is a part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates: *Holford v. Dunnett*, 7 Mees. & W. 352. It is not a covenant to repair

generally, but to so use the property as to avoid the necessity for repairs, as far as possible: *Horsefall v. Mather*, 7 Holt, 9; *Brown v. Crump*, 1 J. J. Marsh. 569; *United States v. Bostwick*, 94 U. S. 66. Nor is there any dispute, so far as relates to the contract of lease, that it contained any express covenant inconsistent with or intended to exclude the operation of such implied covenant. But it is said that the right to purchase the premises with which the defendant is invested at any time during the term under the contract of sale is contradictory of and inconsistent with such implied covenant or obligation, and hence it must be considered as excluded, or as expressly covenanted against.

In this view it would result that the plaintiff has no cause of action. But is this the effect of that contract? It is indisputably true that the two contracts cannot be in force and operation at the same time.

While the contract of sale remains dormant or unexercised, necessarily the lease is in full operation and effect, with all the incidents and implied obligations which result from the relation of landlord and tenant. The intent is, that the lease shall remain intact while the contract of sale remains unexecuted. The exercise of the right to purchase during the term extinguishes the lease, and thus terminates the relation of landlord and tenant, and creates at once the relation of vendor and vendee. The effect is not simply to nullify the implied covenant to use the property in a tenant-like manner, leaving the lease in all other respects in full force and operation, but to blot out of existence the lease, with all its incidents, express or implied. Until put in force, the contract of sale was not antagonistic to the lease; for the instant vitality was infused into it, there was no lease, and the relation of landlord and tenant was thereby determined.

The two contracts could not be operative and co-exist, and hence the contract of sale could not have the effect to modify or otherwise affect any provision of the lease, express or implied, while it was in force. While, therefore, the defendant refrained from exercising the right to purchase, and thus allowed the relation of landlord and tenant to continue, it was impliedly bound to treat the demised premises in such manner that no substantial injury should happen, and to make the tenantable repairs. In such case the rule is, that an action may be maintained on such implied covenants in like

manner as if the instrument had contained express covenants to perform them: *Frey v. Johnson*, 22 How. Pr. 316.

It is next urged that the action is barred by the statute of limitations. The evidence shows that the injuries complained of occurred more than six years before the commencement of this action. Upon this state of facts, the counsel for the defendant asked, and the court refused to give, the following instruction, which is alleged as error: "The plaintiff cannot recover damages in this action for any injury that occurred to the property mentioned in the complaint, if such injury occurred more than six years before the commencement of this action. If, therefore, you find that the warehouse, which is alleged to have been carried away by the water, was so carried away more than six years before the commencement of this action, the plaintiff cannot recover for any damages that may have resulted to him by the washing away of said warehouse." The contention of counsel for the defendant upon this point may be thus summarized: 1. That the relation of landlord and tenant existed between the parties at the time the alleged injury occurred or was committed; 2. That the reversion was in the plaintiff during the whole term; and therefore, 3. That for any damage done to the reversion, an action would lie from the moment the negligent or wrongful act was committed. The cases cited in support of this view, and principally relied upon to sustain it, are: *Provost etc. v. Hallett*, 14 East, 489; *Agate v. Lowenbein*, 57 N. Y. 604. When there is no other contract between the parties in reference to the subject-matter except the lease, as in the cases cited, the correctness of the argument need not be disputed. The question then is, whether the tenant, at the time the wrongful act was done, caused an injury that then affected the plaintiff as to his reversion. When, however, there is lying alongside of the lease, in the same instrument, a contract to purchase the subject-matter demised, which at any time during the term and at the will of the tenant alone may be put in force, and thereby terminate the lease and absorb the reversion, the question then is, whether any right of action for such injuries can be prosecuted while such right to extinguish the lease and own the inheritance remains. In a word, was not the effect of the contract of sale to postpone any remedy under the lease until the time expired in which the contract of sale was to be executed? Now, the action brought by the plaintiff is based on waste, which is defined to be "a spoil or destruction in houses, lands,

or tenements, to the damage of him in reversion or remainder": Taylor on Landlord and Tenant, sec. 345; *Davenport v. Magoon*, 13 Or. 6; 57 Am. Rep. 1.

A reversion is defined by Blackstone to be: "The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him": 2 Bla. Com. 175. Coke describes it as follows: "The returning of land to the grantor, or his heirs, after the grant is over." It seems, then, to have two significations: the one is an estate left, which continues during a particular estate in being; and the other is the returning of the land after the particular estate is ended: Abbott's Law Dictionary. The reason which Mr. Comyn gives why the lessee is bound to treat the premises demised in such a manner that no injury may be done to the inheritance is, "that the estate may revert to the lessor undeteriorated by the willful or negligent conduct of the lessee": Comyn on Landlord and Tenant, 188. Where no other contract exists between the parties but a lease, whether the estate shall revert after the termination of the particular estate, or the residue left in the landlord shall commence in possession after the particular estate is ended, is certain and irrevocably fixed from the nature of the contract; and hence, for any wrongful act done which then causes an injury to the reversion, a right of action immediately accrues. The injury is immediate, though the enjoyment of the reversion is postponed until the expiration of the lease; but this is not our case. Here, the instrument contained two contracts,—a lease and a contract of sale.

After the execution of that instrument, as the defendant did not exercise its right to purchase, it must have entered into possession of the premises under the lease; but it had the right or option at any time within five years after making such contract—even the next day thereafter—to purchase the property and thereby terminate the lease, and release itself from the performance of all things, express or implied, stipulated in the lease.

In any event, the property could not revert to the plaintiff until the expiration of the term of five years, nor could he, under the contract of sale, terminate the lease by tendering a deed, except on the expiration of such term. Not so with the defendant. It could put an end to the lease at any time during the term it chose to exercise its right to purchase the property, and as this right, when exercised, would change the

relation of landlord and tenant into that of vendor and vendee, it would necessarily extinguish any claim which the plaintiff would have to recover damages for waste. Whether the estate would revert to him, or whether he would have a reversionary interest, depended wholly upon the will of the defendant for the period named. So long as such right of purchase lasted, the defendant had the unrestricted legal right to put in force the contract of sale and absorb the lease and reversion, and consequently the plaintiff could have no right of action for waste which it was not in the power of the railroad company to defeat or extinguish. The fact whether the estate should finally or ever revert to the plaintiff is not fixed and certain, but dependent exclusively upon the will of the defendant during the term and while the legal right to exercise it remains. There can be no act of waste committed during such term which the defendant cannot avoid by the exercise of such right to purchase. In such case the plaintiff's right of action can only be maintained when the defendant's right to purchase is gone or lapsed. It seems to us this result is inevitable. For, if the defendant chose to buy the property after the alleged waste was committed, which it had the undoubted right to do, it would, so to speak, repair its own wrong by taking to itself the reversion, and thereby extinguish any right of action for such alleged injuries resulting to it. The effect would be to determine the relation of landlord and tenant, and the parties thereafter would stand in the relation of vendor and vendee under the contract of sale. *Knerr v. Bradley*, 105 Pa. St. 191. This shows that the right to buy, which such contract gave to the railroad company, might be used to defeat such action, and that while it lasted, the plaintiff's right to sue for injuries to the reversion must be postponed until the expiration of the term.

It seems somewhat anomalous, when the defendant could have terminated the lease at its option, and the power to do so rested exclusively with it during the five years, and at the time and after the alleged wrongful acts of waste were committed, that it should claim that the contract was inconsistent with the lease, when it failed or refused to supplant the lease by putting the contract in operation, or that the plaintiff had an immediate right of action for the injuries to the reversion, when it was in its power to take to itself such reversion, and deprive the plaintiff of his character as landlord, without which he cannot maintain this action. We do

not think, therefore, there was any error in refusing to give the instruction asked, nor the instruction given by the court, to the effect that the remedy of the plaintiff was delayed until the expiration of the time mentioned in the contract, or the further instruction that the plaintiff could not have maintained an action for waste during the time of the lease, because he would have been met by the contract, except as to the criticism in respect of the possession, which is not material.

The next assignment of error is to this instruction: "If, through the defendant getting into lawsuits, the property went into the hands of a receiver, this plaintiff is not responsible for that. He had nothing to do with that lawsuit; he is an outside party altogether. Although the other party might have been unfortunate, it would have to answer damages to Mr. Powell for any damages occurring. It was the defendant's business to deliver up the property at the end of five years in a good condition." It appears by the record that the alleged acts of waste, or at least the greater portion of them, occurred while the property of the railroad company was in the hands of a receiver. The counsel for the defendant contends that, aside from the instruction being misleading in its concluding portion, it assumes that the defendant is responsible for the acts of the receiver. It is no doubt true, as the authorities cited show, that it has often been held that a railroad company is not liable for injuries inflicted by a receiver, or his servants, while the property was in his possession as such receiver, and when it was out of the possession of the railroad company, and it had no control over it: *Ohio etc. R. R. Co. v. Davis*, 23 Ind. 560; 85 Am. Dec. 477; *Metz v. Buffalo etc. R. R. Co.*, 58 N. Y. 61; 17 Am. Rep. 201; *Davis v. Duncan*, Cir. Ct. Miss., 1884. In such cases the possession of the receiver is not the possession of the railroad company, but his possession is the possession of the court by whom he is appointed and controlled. Hence the acts of the receiver are not the acts of the company, nor can it control the receiver or his servants. The reason is, there is no principle of agency existing between them, or relation of master and servant, which renders the railroad company liable for the acts of the receiver or his employees. But how is this principle to be evoked to excuse the defendant for the alleged waste. There is no pretense that the plaintiff was in any way connected with causing or asking for the appointment of a receiver for

the defendant, or that he has done any act which operates or has operated to work an ouster or eviction.

The only question in the present action is, whether the covenant is excused by the fact that the breach is caused by the act of a stranger. As before stated, the implied obligation of the tenant to treat the premises in such a manner that no substantial injury shall happen to them is as much a part and parcel of the contract as if incorporated in it by express language. "It results from the relation of landlord and tenant between the parties which the contract creates": *United States v. Bostwick*, 94 U. S. 66. Whenever a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against such liabilities by his contract: Per Lord Ellenborough, in *Atkinson v. Ritchie*, 10 East, 530. "And therefore," says Mr. Platt, "if a lessee covenants to repair a house, though it be destroyed by lightning, or thrown down by enemies, yet he ought to repair it": Platt on Covenants, sec. 582; *Paradine v. Jane*, Aleyn, 27. As a consequence of this doctrine of the law, in the absence of special agreement, a lessee is liable to his lessor for all waste by whomsoever committed, and may have his action over against the actual wrong-doer: *Cook v. Champlain Trans. Co.*, 1 Denio, 91; *Parrott v. Barney*, 2 Abb. Adm. 197.

Said Beardsley, J.: "The plaintiff claims that the mill was destroyed by the wrongful acts of the defendants; and if so, it was waste, for which the plaintiff, being tenant for years, was responsible." "It is common learning," said Heath, J., in *Attersoll v. Stevens*, 1 Taunt. 198, "that every lessee of land, whether for life or years, is liable in an action for waste to his lessor, for all waste done on the land in the lease, by whomsoever it may be committed." Chambers, J., said: "The situation of the tenant is extremely analogous to that of a common carrier to prevent collusion (and not the presumption of actual collusion); both are charged with the protection of the property intrusted to them against all but the acts of God and the king's enemies; and as the tenant in one case is charged with the actual commission of the waste done by others, so in the other case the carrier is charged with actual default and negligence, though he loses the goods by that which was irresistible, or by fraud, against which no ordinary degree of care and caution could have protected him." Lord Coke is not less explicit, for he says: "Tenants by the curtesy, tenants in dower, tenants

for life, years, etc., shall answer for the waste done by a stranger, and shall take the remedy over": 4 Kent's Com. 77; 3 Bla. Com. 228; Comyns on Landlord and Tenant, 188; *Cook v. Champlain Trans. Co.*, 1 Denio, 91; *Austin v. Hudson River R. R. Co.*, 25 N. Y. 340. As the defendant was bound to answer to the plaintiff for the waste, and had his remedy over against the receiver, if wrong-doer, or apply to the court, who would not permit its possession to result in wrong for the necessary protection or relief, it results that the plaintiff is entitled to recover, and there was no error in the instruction.

It is next claimed that the plaintiff by his former action for the purchase price waived his right to sue for damages under the lease, and by said election of remedies barred the present action. This must proceed on the assumption that the plaintiff had a right of action under the contract of sale at the time it was brought. The facts are, that neither the defendant at any time during the term, or the plaintiff on its expiration, put the other in default, but permitted such contract to lapse, and consequently, as was held in *Powell v. Dayton, S. & G. R. R. Co.*, 14 Or. 356, no right of action could be based upon it, and the complaint was dismissed. If the plaintiff had infused vitality into that contract by tendering a deed, and then the defendant had refused to accept or perform under it, he would have had an action for the purchase price upon it; but then he would have had no lease, or right to bring an action for damages on it. This is not a case where the remedies are concurrent, and an election between them once being made, the right to follow the other is gone forever.

Upon the further point in respect to the dissolution of the defendant, it is sufficient to say that we are unable to reach the result claimed by counsel for the defendant, and upon the whole case think the judgment must be affirmed, and it is so ordered.

WASTE, ACTION FOR IS NOT DEFEATED BY TRANSFER of the premises, pending the action, by the plaintiff to the defendant: *Dickinson v. Mayor*, 48 Md. 583; 30 Am. Rep. 492.

IN ACTION BY OWNER FOR DAMAGES SUSTAINED WHILE PROPERTY WAS LEASED to another party, he is not entitled to recover, if it appears that the injury was committed before the property was leased, and while he was owner in fee: *McConnel v. Kibbe*, 33 Ill. 175; 85 Am. Dec. 265.

BARTON v. SAUNDERS.

[16 OREGON, 51.]

JURISDICTION. — WHERE COURT ACQUIRES JURISDICTION OVER SUBJECT-MATTER AND PERSON, it becomes its right and duty to determine every question which may arise in the cause without interference from any other tribunal.

WRIT OF HABEAS CORPUS CANNOT REACH ERRORS or irregularities which render proceedings voidable merely, but only such defects in substance as renders the process or judgment absolutely void.

HABEAS CORPUS. — PERSON ARRESTED IN CIVIL ACTION WILL NOT BE DISCHARGED ON HABEAS CORPUS, on the ground that the affidavit of arrest only states in the statutory language that the "defendant has been guilty of a fraud in contracting the debt" sued on, etc., without alleging the facts constituting the fraud, such defect being an irregularity or error rendering the process voidable only, and not absolutely void.

HABEAS CORPUS. — IT IS UNANSWERABLE RETURN TO WRIT OF HABEAS CORPUS that the court had jurisdiction in which the action was pending, and out of which the writ of arrest was issued, and was competent to correct any error or abuse of its powers, or to set it aside if erroneously issued.

R. Eakin, and Cox, Smith, and Teal, for the appellant.

T. H. Crawford, and Ramsey and Bingham, for the respondent.

LORD, C. J. This is an appeal brought to reverse a judgment discharging the plaintiff from arrest, in a *habeas corpus* proceeding. The facts are these: The Mercantile Company commenced an action in the circuit court against the plaintiff to recover a certain sum of money, and in said action procured a writ of arrest to be issued, and the plaintiff taken into custody by the defendant's intestate, who was then the sheriff of Union County. Shortly thereafter the plaintiff sued out a writ of *habeas corpus* before the county judge of said county, upon which an order was made discharging him from arrest, and from this order the defendant appealed to the circuit court, where a judgment was rendered affirming the judgment of the county court. The defendant's intestate died, and she, being appointed his administratrix, was substituted in his stead, and prosecutes this appeal. The case rests mainly on the sufficiency of the affidavit for the writ of arrest, which alleged as the ground therefor "that the defendant [plaintiff here] has been guilty of fraud in contracting the said debt, and that defendant has removed and disposed of his property with intent to defraud his creditors."

Our statute provides that no person shall be arrested in an action at law, except, among other cases, in the following in-

stances: "4. When the defendant has been guilty of a fraud in contracting the debt," etc.; and "5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors": Hill's Code, sec. 108. It also provides how, at any time after the commencement of the action, the plaintiff may entitle himself to a writ of arrest, etc., and that the affidavit required may be either positive or upon information and belief, etc.: Id., sec. 109, subds. 1, 2. And finally, for the protection of the defendant, it is also further provided that "a defendant arrested may at any time before judgment apply on motion to the court, or the judge thereof, in which the action is pending, upon notice to the plaintiff, to vacate the writ of arrest": Id., sec. 130; and that "if the motion be made upon affidavits or other proofs on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs in addition to those upon which the writ was issued. If upon the hearing of such motion it shall satisfactorily appear that there was not sufficient cause to allow the writ, the same shall be vacated": Id., sec. 131.

Upon *habeas corpus*, it is provided that "if it appear on the return that the prisoner is in custody by virtue of an order or civil process of any court legally constituted, or issued by an officer in course of judicial proceedings before him, authorized by law, such prisoner shall only be discharged in the following cases: 3. When the order or process is defective in some matter of substance required by law, rendering such process void; 4. When the order or process, though in proper form, has been issued in a case not allowed by law; 5. When the order or process is not authorized by any judgment or decree of any court, nor by any provision of law": Hill's Code, sec. 622.

These different provisions of our code have been grouped for the purpose of showing some of the grounds for which an arrest is allowed, the mode to be pursued in obtaining the writ, and in case of any defect, how it may be vacated and the prisoner discharged by a proceeding in the court in which the action is pending; and also to show some of the grounds which will authorize a court to discharge a prisoner in custody as an unlawful restraint of his liberty. The contention of counsel for the plaintiff is, that the proceeding for arrest was void on its face, and therefore authorized the court to inquire, and to discharge him as unlawfully restrained of his liberty. This

contention is based on the idea that the affidavit constitutes a part of the process, and as it did not set forth the probative facts constituting the alleged fraud, it was fatally defective on its face.

The question then is, whether the process has the sanction and authority of law; for it will be admitted, if there was no authority to arrest the defendant, he should be discharged. When the code declares that the prisoner in a *habeas corpus* proceeding shall be discharged in certain cases, when in custody under civil process, we shall give the prisoner the benefit of the equity of the statute by assuming that he shall be discharged in such cases. That is to say, when it shall appear on the return of the writ that the order or process was defective in some matter of substance required by law, rendering such process void, or that the process, though in proper form, had been issued in a case not allowed by law, or that the process is not authorized by any judgment or decree of any court, nor by any provision of law: Hill's Code, sec. 622, subds. 3, 4, 6. It is an elementary principle that where a court acquires jurisdiction over the subject-matter and the person, it becomes its right and duty to determine every question which may arise in the cause without interference from any other tribunal. Upon the facts as disclosed by this record, it cannot be disputed but that the court had full and complete jurisdiction, under the statute, of the subject-matter of the proceeding and of the person of the defendant, and was competent to correct any abuse of its process, or discharge the prisoner if it should satisfactorily appear there was no cause for the arrest.

The cause of action, the affidavit for a writ of arrest and the grounds thereof, the issuing of the writ, etc., were all matters not only within the jurisdiction of the court, but the process shows that it was issued in a case allowed by law and in the language of its provisions. Hence the case does not come within any of the subdivisions of section 622 of the *habeas corpus* provisions, unless it be subdivision 3 of that section, that the process was defective in some matter of substance required by law, rendering such process void. "When the return shows," says Mr. Hurd, "a detainer under legal process, the only proper points for examination are the existence, validity, and present legal force of the process": Hurd on Habeas Corpus, 332. Looking at this, what is the ground or defect of substance in the process, if the affidavit be a part of it, which renders it void? The counsel answers, the defect is

not stating the facts in what the fraud consists; that the affidavit only states in the language of the statute that the "defendant has been guilty of a fraud in contracting the debt," etc., instead of setting forth the facts constituting the fraud, or cause of arrest; in a word, that facts are not set forth, but conclusions of law. "But," says Mr. Hurd, "a proceeding defective for irregularity and one void for illegality may be reversed upon error or *certiorari*, but it is the latter defect only which gives authority to discharge on *habeas corpus*": *Id.* 327.

Errors or irregularities which render proceedings voidable merely, the writ of *habeas corpus* cannot reach, but only such defects in substance as renders the process or judgment absolutely void. An irregularity is defined to be "the want of adherence to some prescribed rule or mode of proceeding, and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner": *Tidd's Practice*, 434. "It is the technical term for every defect in practical proceedings, or the mode of conducting an action or defense, as distinguished from defects in pleadings. On the other hand, illegality is properly predictable of radical defects only, and signifies that which is contrary to the principles of law as distinguished from mere rules of procedure. It denotes a complete defect in the proceedings": *Id.* 435; *Hurd on Habeas Corpus*, 333. The allegation of the affidavit is, in the language of the statute, declared to be a ground which authorizes the issuance of the writ of arrest. Was the substantive fact relied upon as stated a radical defect, or only, to say the most, an irregularity or error, within the meaning of the distinction taken, rendering the process only voidable? A process is not a nullity because it was issued imprudently, or in a manner not warranted by law. There must be a defect of substance, or the omission to allege something material, and without which the affidavit would be a nullity. Where the matter is itself insufficient, without reference to the manner of stating it, it goes to the substance, but where it goes to the manner of stating it, the defect is merely formal. The matter here alleged is fraud in contradicting the obligation, which by the express words of the statute is itself sufficient to authorize a writ of arrest, and the objection in not stating the facts in which the fraud consists goes only to the manner of stating it, and is not a defect of substance. This is even true as tested

by the stricter rules of pleading. "If the pleading," says Mr. Pomeroy, "should aver conclusions of law in place of fact, as claimed here, the resulting insufficiency and imperfection would pertain to form rather than substance, and the mode of correction would be by a motion, and not by a demurrer": Pomeroy on Remedies, sec. 549.

The elements of fact and law are so blended in the affidavit, taken as a whole, that no one can fail to understand the nature of the transaction and the ground of arrest, and in such case the rule is invariable that the pleading cannot be treated as a nullity, but that the party must avoid or correct it by motion: Bliss on Code Pleading, sec. 213. We do not mean to say that the facts relied upon must not be stated. No rule of pleading is better established than that facts must be stated, and not legal conclusions, and that fraud, when pleaded, must state the facts upon which the charge is based. The point that we make is, that it is no "such radical defect as renders the proceeding in which it occurs totally null and void, of no avail and effect whatever, and incapable of being made so." It is not an omission of some material matter; the fraud is alleged, and that is the substance of the ground of arrest, and sufficient to authorize the writ; but the fact that such material matter is defectively stated does not render the process void, because it is an error or irregularity which may be corrected on motion in the court in which the action is pending, and not an illegality which renders the process void from the beginning. "There is a great difference," said Chief Justice De Grey, "between erroneous process and void process. The first stands valid and good until it be reversed; the latter is an absolute nullity from the beginning": *Parsons v. Loyd*, 3 Wils. 345. The writ of *habeas corpus* was not designed to operate as a writ of error or *certiorari*, and does not have their force and effect.

It was not intended to correct errors or irregularities which only have the effect to render proceedings voidable merely, but such only as render them absolutely void. That it is the proper remedy, and may be resorted to for relief from every illegal imprisonment, no one will deny, and for this salutary purpose the doors of every court of justice invested with the power to issue the writ ought to stand wide open; but it cannot be used to subvert the law and usurp the power of appellate courts, or interfere and review the proceedings of other courts.

Imprisonment under an order or process irregularly issued, which may be set aside, constitutes no ground for its issuance. "To put it to such use," said Sanderson, J., "would be to convert it into a writ of error, and confer upon every officer who has authority to issue the writ appellate jurisdiction over the orders and judgment of the highest tribunals in the land. County judges, though occupying an inferior position and exercising an inferior jurisdiction, would be, by such a rule, empowered to review and practically reverse the judgments and orders of the district courts, and of the supreme court itself, and also the federal courts exercising jurisdiction within the state. Establish that the judgments and orders of courts may be reviewed on *habeas corpus* upon the grounds of error, and appeals for the correction of errors may be dispensed with in all cases in which the arrest or imprisonment of persons is allowed. Every criminal action, every civil action in which an arrest is given, and every proceeding for contempt, could be brought to the supreme court by writs of *habeas corpus*. Not only that, but, as already suggested, inferior tribunals would be called upon to review the judgments of superior tribunals, and tribunals of equal grade to interfere and review each other's proceedings. Such a rule would render all judicial proceedings amorphous, and lead to the utmost confusion and disorder. It is well settled that *habeas corpus* can be put to no such use, and that its functions, where the party who has appealed to its aid is in custody under process, do not extend beyond the inquiry into the jurisdiction of the court by which it was issued, and the validity of its process upon its face": *Ex parte McCullough*, 35 Cal. 100; *People v. Cassels*, 5 Hill, 167. That the court had jurisdiction in which the action was pending, and out of which the writ of arrest was issued, and was competent to correct any error or abuse of its process, or to set it aside if erroneously issued, is an unanswerable return to a writ of *habeas corpus*. This result renders it unnecessary to examine other questions.

The judgment is error, and is reversed, and writ dismissed.

HABEAS CORPUS CANNOT BE USED TO REVIEW ERRORS OR IRREGULARITIES: *Sennott's Case*, 146 Mass. 489; 4 Am. St. Rep. 344, and cases collected in note 348; *Ex parte Kitchen*, 19 Nev. 178; *State v. Neel*, 48 Ark. 283; *Ex parte Lehmkuhl*, 72 Cal. 53.

UNDER WRIT OF HABEAS CORPUS, NOTHING WILL BE INQUIRED into but the validity of the process upon its face, and the jurisdiction of the court which issued it: *State v. Neel*, 48 Ark. 283.

CONSTITUTIONALITY OF ACT UNDER WHICH PARTY HAS BEEN CONVICTED may be inquired into on *habeas corpus*: *Ex parte Rosenblatt*, 19 Nev. 439; 3 Am. St. Rep. 901, and cases collected in note 903.

WRIT OF HABEAS CORPUS, AS KNOWN AND USED AT COMMON LAW, CANNOT BE ABROGATED, or its efficiency curtailed by legislative action: *People v. Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211.

STEWART v. HUNTER.

[16 OREGON, 62.]

PLEADING AND PRACTICE. — TRIAL COURTS SHOULD NOT INSTRUCT JURIES BY READING TO THEM an opinion of the court in another case. If they desire to adopt such opinion as the law of the case, they should copy from it the portions that are applicable, and deliver them as their own opinion of the law.

ESTRAYS. — ANIMAL ESCAPING FROM ITS OWNER AND WANDERING ABOUT is an estray, within the meaning of the Oregon statute upon that subject. But an animal turned upon a range by its owner, and permitted to run at large, is not an estray, although its owner is ignorant of its immediate whereabouts, so long as it does not wander from the range and become lost.

TAKING UP ESTRAY PROPER, PURSUANT TO LAW, AND CAUSING IT TO BE SOLD in order to reimburse the party for the reasonable expenses incurred, is not depriving the owner of his property "without due process of law," but is a preservation of it for his benefit.

ESTRAYS. — FACT THAT ANIMAL IS BRANDED FURNISHES EVIDENCE of its ownership, but is not constructive notice that it belongs to the party branding it, although the brand is recorded.

R. Eakin and Brother, for the appellant.

J. R. Crites and C. H. Finn, for the respondent.

THAYER, J. This appeal comes here from a judgment of the circuit court for the county of Union. The appellant commenced an action in that court against the respondent to recover the possession of a certain mare and colt alleged to be wrongfully detained by the respondent. The respondent claims to have taken up the animals under the statute of the state relating to estrays. A trial by jury was had in the circuit court, which resulted in a verdict for the respondent, upon which the judgment appealed from was entered.

The main question of law we are called upon to decide arises out of the instructions of the court to the jury. It was strongly contested in the circuit court as to whether the animals were estrays or not. It appears that the mare and colt were running upon the range in the vicinity of the respondent's residence, and seem to have gotten with his stock, which was

also running upon the range at the time. The range was a large section of open country, and was pastured by different owners of stock. The mare had been branded at the time she was taken up with the appellant's brand, which a long time prior thereto had been recorded in the office of the clerk of the county of Union. The appellant's counsel contended in the circuit court, and claims here, that the record of the brand was notice to the respondent of the ownership of the animal. He also contended that stock running upon a range, under such circumstances as the animals in question ran there, could not be regarded as estrays. It appears from the evidence in the case that such stock was allowed to run out all winter, and very little of it was fed. The question as to whether the animals were estrays or not was a very proper one for the jury to determine, after being instructed as to what constituted an estray under the statute referred to.

The circuit court in giving instructions upon that point confined itself almost entirely to reading to the jury the opinion of this court in *Shepherd v. Hawley*, 4 Or. 206. The bill of exceptions states that "after the argument of counsel, the court instructed the jury upon the law, and read to the jury as the law of the case the opinion of the court in," etc., referring to *Shepherd v. Hawley, supra*. After the jury had been out a while and could not agree, they returned to the court-room for further instructions as to what constituted an estray, and were further instructed by the court thereon, and again retired; but again failing to agree, again returned for further instructions upon what constituted an estray, and the court again read to the jury the opinion in the case of *Shepherd v. Hawley, supra*, and otherwise instructed them. Thereupon counsel for plaintiff asked the court to instruct that under said case of *Shepherd v. Hawley, supra*, "that an animal on the range, where it is placed or permitted to run by its owner, is not an estray," — which instruction the court refused to give, and plaintiff's counsel excepted. The jury then retired, and returned the verdict before mentioned. In *Shepherd v. Hawley, supra*, it was contended on the part of the appellant that a breachy or vicious animal running at large about the premises of a householder might be taken up and posted during any month, although the owner of said animal was well known to the person taking it up. That was the principal question this court was required to decide in that case.

The question as to what constituted an estray was before

the court, and passed upon in its opinion. Reading the opinion of the court in that case was therefore liable to mislead them. The main point in the opinion was not at all analogous to the one involved in this case. It may have been that the circuit court only read to the jury the part of the said opinion bearing upon the question as to what constituted an estray; but the bill of exceptions would seem to imply that the court read the entire opinion to the jury. At all events, the jury seem to have been very much embarrassed in regard to the question. And when the appellant's counsel requested the instruction referred to, and the court refused to give it, the impression left upon their minds must have been that the part of the opinion which the appellant's counsel had in view when he requested the said instruction to be given was not to be considered apart from the remainder of the opinion. It is apparent that the submitting of the opinion in *Shepherd v. Hawley*, *supra*, as the law of the case which the jury were considering, as shown by the bill of exceptions, was calculated to mislead them. This was error: *Talmage v. Davenport*, 31 N. J. L. 561.

Trial courts should not instruct juries in that manner. If they desire to adopt the opinion of a court in another case as the law of the case before them, they should copy from it the portions that are applicable, and deliver them as their own opinion of the law. To attempt to instruct a jury by reading to them from a book an opinion in another case is very liable to confuse them. The decision in *Shepherd v. Hawley*, *supra* as to what constituted an estray, is undoubtedly the law. An animal that has escaped from its owner and wanders about is an estray, within the meaning of the statute upon that subject. It becomes lost to the owner; and when it attempts to take up with a new master, and habituate itself to running at large about his premises, he is authorized, if a householder, to take it up in the manner prescribed by the statute. Counsel for appellant contends "that the legislature had no power to authorize a person to take up and dispose of animals belonging to others, as provided in said statute. He contends that the owner of property cannot be divested of his ownership in that manner."

No person can be deprived of his property except by due process of law; and an attempt upon the part of the legislature to authorize one person to take and dispose of the property of another, and thus summarily deprive him of it, would not be "due process of law," within the meaning of that ex-

pression as used in the constitution of the state and of the United States. But the taking up of an estray proper is not the depriving the owner of his property in a constitutional sense; it is a preservation of it for his benefit. The animal is beyond his control,—is lost as to him, and is liable to perish unless taken up and cared for by some one. The person interfering with the animal under such circumstances confers upon the owner a benefit. It is a highly meritorious act when done in good faith; and the law gives the party a claim upon the animal for the reasonable expenses incurred, and authorizes a sale of it in order to reimburse him. The remainder of the proceeds of the sale is deposited for the owner. It is only when the law is misconstrued and misapplied that parties affected by it have cause to complain. Taking up animals as estrays which are not such is an abuse of the law which courts and juries ought not to tolerate. An animal turned upon a range like the one referred to, and permitted to run at large, would not be an estray because its owner was ignorant of its present whereabouts. The animal is expected to roam about, under such circumstances, and its particular habitation be to him a mere matter of conjecture. He does not care to know where it is, supposing that he can, of course, bring it in when he makes his "general round-up." But if he is then unable to find it, or if it has, in the mean time, gone beyond the section of country in which it was expected to run, has strayed away from his other stock, and is wandering about in a distant locality, and becomes lost to him, it is an estray.

The effect of the verdict of the jury in this case was to determine that the mare and colt in question were estrays, and if the trial judge had instructed the jury as to what constituted an estray, when the case was submitted to them, we would not have undertaken to disturb the judgment recovered; but from what we have been able to discover from the record, we must conclude that they were not informed upon the subject beyond what they were enabled to learn by hearing the opinion in the other case read, and that contained enough different features from this to confound their understanding completely. We have considered the question raised by the defendant's counsel as to the effect of the recording of the description of the brand, and are unable to agree with the view which the counsel attempts to maintain. The object in having such a record made is to prevent other parties from

using the same mark or brand. When a person has a description of that kind recorded, it is a notice to every one who may desire to adopt a brand as to the character of the one he has adopted. The statute provides that the same description shall not be recorded for more than one resident of the same county: Misc. Laws, c. 33, sec. 9. This provision tends to secure a person in the sole use of any device he may adopt for the purpose of marking his stock. Branding stock furnishes evidence of its ownership, though it does not constitute implied notice of the fact. It is a circumstance which will aid in ascertaining to whom it belongs, but is not constructive notice that it belongs to the party branding it.

The judgment appealed from must be reversed, and the case remanded for a new trial.

INSTRUCTION WHICH HAS TENDENCY TO MISLEAD JURY should not be given: *State v. Benham*, 23 Iowa, 154; 92 Am. Dec. 416; *Baltimore etc. R. R. Co. v. Boyd*, 67 Md. 32; 1 Am. St. Rep. 362; or should be explained or modified: *Snydacker v. Brosse*, 51 Ill. 357; 99 Am. Dec. 551.

JUDGE NEED NOT INSTRUCT JURY ON HISTORY OR OBJECT OF LAW, it being sufficient that he states the law itself: *Lincoln v. Wright*, 23 Pa. St. 76; 62 Am. Dec. 316.

GENERAL FEATURES OF ESTRAY LAWS IN THE UNITED STATES—THEIR CONSTITUTIONALITY AND INTERPRETATION. — *The common law permitted a land-owner to be his own avenger*, or to minister redress to himself by distraining another's cattle damage-feasant: 3 Bla. Com. 7; *Mosher v. Jewett*, 63 Me. 84, 88; *Cook v. Gregg*, 46 N. Y. 439. But the matter is now regulated by statutory enactments in the several states, providing for the seizure and impounding of cattle taken damage-feasant, and for their sale, if, after reasonable notice to redeem, damages and expenses are not paid. A statute so providing is held to be a police regulation within the scope of governmental powers, the exercise of which may be delegated to a municipal or other public corporation; and it is not violative of the constitutional provision declaring that no person "shall be deprived of life, liberty, or property but by due course of law": *Dillard v. Webb*, 55 Ala. 468; *Rood v. McCargar*, 49 Cal. 117; *Fort Smith v. Dodson*, 46 Ark. 296; 55 Am. Rep. 589; *Squares v. Campbell*, 41 How. Pr. 193; *Blair v. Forehand*, 100 Mass. 136; 97 Am. Dec. 88, note, where the decisions upon the subject are collected, and the constitutionality of estray laws discussed: Compare *Slessman v. Crozier*, 80 Ind. 487. As a matter of fact, almost all cities and large towns have ordinances forbidding estrays and animals generally to run at large, providing pounds, and authorizing sales to meet expenses. And it is only when such ordinances fail to protect the rights of the owners of the animals, or fail to furnish them the means of redeeming them by paying the proper charges, or when the regulations prescribed are not complied with, that the law withholds its sanction: See *Dillard v. Webb*, 55 Ala. 468, 476; *Campbell v. Evans*, 45 N. Y. 356. All such proceedings are *stricti juris*, in accordance with the established principle, that when by statute a special authority is given to particular persons, affecting the property of individuals, it must be strictly pursued, and must

appear upon the face of the proceedings: *Rex v. Croke*, 1 Cowp. 26; *Chaffee v. Harrington*, 60 Vt. 718. The language of the authorities is, that a party who justifies the taking of another's property, under legal authority or process, must show that he has acted strictly in conformity with the requirements of law; otherwise, he will be considered a trespasser *ab initio*, and liable to an action of trespass at common law: *Id.*; *Coffin v. Field*, 7 Cush. 355; *Strauser v. Kosier*, 58 Pa. St. 496; *Deirks v. Wielage*, 18 Neb. 176; *Armbruster v. Wilson*, 43 Hun, 261, 264.

An *estray technically*, and as generally understood in the estray laws, is an animal of which the owner is unknown: *Lyman v. Gipson*, 18 Pick. 422, 426; a beast wandering at large, or lost, or whose owner is unknown: *Walters v. Gluts*, 29 Iowa, 439; *Shepherd v. Hawley*, 4 Or. 206. The true and only test is, that the animal should be wandering, and that the owner be unknown to the person who takes it up as an estray: *Kinney v. Roe*, 70 Iowa, 509, 511. See *Hardy v. Nyc*, 63 N. H. 612. Cattle driven along a road in charge of a herder, and which, in passing, casually eat of the grass growing on the roadside, are not "estrays" or "running at large," within the California estray act: *Thompson v. Corpstein*, 52 Cal. 653; and the fact that the herder accidentally falls asleep while attending to the cattle does not cause them to be "running at large" or "estrays," within such act: *Id.* So when cattle are in the public highway, in charge of a person directing or controlling their movements, they are not "running at large," within the meaning of the Michigan statute. The language applies to animals in the highway without being in the custody or under the control of any person: *Bertwhistle v. Goodrich*, 53 Mich. 457. See *Blanck v. Hirth*, 56 Id. 330. But under the usual definition of an estray, it is immaterial how the animal escaped from the owner,—whether by his voluntary act, by the act of a trespasser upon his premises, or by a thief. Accordingly, the fact that a horse found running at large has escaped from or been turned loose by a thief will not prevent one who distrains him, and complies with the provisions of the statute concerning estrays, from acquiring a good title to him, in due time, under the estray laws: *Kinney v. Roe*, 70 Iowa, 509.

The decisions are numerous which insist upon a strict compliance with the requirements of statutes relative to the rights and duties of the finder of an estray. Thus in Pennsylvania a magistrate has no authority to adjudge a forfeiture, unless everything required by the statute to give him authority appears: *Strauser v. Kosier*, 58 Pa. St. 496. It is incumbent upon one who claims that he has acquired the property to show that the statutory forms of proceeding have been strictly pursued: *Id.* And if the distrainer is unable to comply with the provisions of the statute, for the reason that the officers who are to assess the damages do not exist, or cannot be found within the time prescribed by statute thereafter, then the seizure is unlawful, and the owner may bring replevin to recover the possession of his property: *Armbruster v. Wilson*, 43 Hun, 261. So in replevin for a colt, which the finder had seized and sold at public auction under the statute, as a stray beast, to the defendant, it was held that a joint owner could recover, on the ground that the description of the estray in the advertisement was insufficient, and also that the advertisement was not seasonably recorded in the town clerk's office: *Chaffee v. Harrington*, 60 Vt. 718. The statute authorizing the proceedings not having been strictly pursued, the defendant acquired no title to the property as against the plaintiff by his purchase of it at the auction sale; and as the plaintiff had the right of possession, he could maintain the action in his name: *Id.* So it is no excuse

for failure to advertise a stray animal as the law requires that the owner claimed the animal and promised to produce proof of ownership: *Wright v. Richmond*, 21 Mo. App. 76.

The law from the earliest times has regarded the using of estrays, or distressed animals, as a tort, save only when the use was necessary to their preservation, as, for instance, in the case of milk cows: Cro. Jac. 148; 3 Bla. Com. 13; *Barrett v. Lightfoot*, 1 T. B. Mon. 241; 15 Am. Dec. 110. And the doctrine of the later decisions is, that estrays cannot lawfully be used by the finder, unless to use them be necessary for their preservation, and for the benefit of the rightful owner: *Weber v. Hartman*, 7 Col. 13; 49 Am. Rep. 339; and see *Murgoo v. Cogswell*, 1 E. D. Smith, 359.

SHIRLEY v. BURCH.

[16 OREGON, 83.]

MORTGAGES. — NAME OF MORTGAGEE — INSTRUMENT IN FORM OF MORTGAGE, COMPLETE IN EVERY PARTICULAR except that the name of the mortgagee is left blank, cannot be given validity by the insertion of the name of a mortgagee by an agent to whom the mortgagor delivered the instrument, with authority to fill the blank and procure money from any person who would advance it upon the instrument as security.

NOTE AND ACCOMPANYING MORTGAGE ARE VOID FOR WANT OF legal delivery, where the person named as payee in the former and as mortgagee in the latter never had any knowledge of or interest in the transaction, and the papers were not delivered to him, but to another.

WHERE EVIDENCE DISCLOSES FACT THAT THERE WAS SUCH PERSON AS THAT NAMED as mortgagee in the mortgage, but that he had no interest in the transaction, and disclaimed any knowledge of or connection with it, in such case the payee of the note and mortgage is to be deemed fictitious.

COURT OF EQUITY WILL NOT DECREE FORECLOSURE OF MORTGAGE VOID IN LAW because of the want of the name of a proper mortgagee, although all the acts of the plaintiff in the transaction may have been in good faith.

APPEAL. — DECREE, THOUGH ERRONEOUS, WILL NOT BE DISTURBED BY APPELLATE COURT, no objection thereto having been made by the party to be affected.

N. B. Knight and J. J. Murphy, for the appellant.

Ramsey and Bingham, for D. B. Gaunt.

Ford and Kaiser, for A. N. Gilbert and M. E. Campbell.

STRAHAN, J. — This is a suit commenced by the plaintiff against the defendants, H. C. Burch and wife, W. McGee, H. C. Wandt, Gilbert Brothers, J. A. Stratton, D. B. Gaunt, M. E. Campbell, Meier and Frank, and G. N. Townsend, to foreclose a mortgage on certain real property in Yamhill County. Burch and wife are alleged to be the makers of the mortgage,

and the other defendants are alleged to have liens on the mortgaged premises subsequent to that of the plaintiff. The complaint, amongst other things, alleges in substance the making of the note sued on to one Joseph Chandler or bearer, for two thousand five hundred dollars, on the 24th of March, 1882, by the defendant H. C. Burch; the making of the mortgage to secure the same at the same time, which was executed and delivered to "said Joseph Chandler, payee in said promissory note."

The complaint also contains the following allegation: "That the plaintiff is now the lawful owner and holder of said promissory note and said mortgage, having purchased the same for a valuable consideration long before the maturity thereof of said mortgagee, who duly assigned the same to the plaintiff by delivery to him of said note and mortgage." All of the defendants except Meier and Frank answered, denying the material allegations of the complaint, and the alleged junior lien-holders each set up his particular claim, and claimed priority over the plaintiff's mortgage. They deny the execution or delivery of said note and mortgage to Joseph Chandler, or the assignment or delivery thereof to the plaintiff, and allege that said Chandler is a fictitious person.

The cause being at issue, it was referred to take the evidence and report the same to the court, and upon the report being filed, the case was heard by the court, and a decree rendered postponing the plaintiff's lien to that of all of the other lien claimants, and settling their equities and priorities between themselves, and decreeing the sale of the premises described in the mortgage to satisfy the claims in the order specified in the decree. From that decree the plaintiff has appealed to this court, and the cause has been ably argued here, both on the facts and law.

The court below found a number of facts which are stated in the record, a part of which are as follows: 1. That on the twenty-fourth day of March, 1882, the defendant executed the note described in the complaint for the sum of two thousand five hundred dollars, due in two years from date thereof, interest at the rate of ten per cent per annum, and agreed by the terms thereof to pay a reasonable attorney's fee in case suit should be brought to collect the same, and delivered said note to one E. J. Dawne; 2. That on the twenty-fourth day of March, 1882, said defendant H. C. Burch executed the mortgage mentioned in the complaint with the intent on his part

to secure the payment of said note, and delivered said mortgage to said E. J. Dawne; and that on the twenty-fifth day of March, 1882, said E. J. Dawne caused said mortgage to be filed in due form in the county clerk's office of Yamhill County, and that the same was duly recorded in the records of mortgages in said county; 3. That the interest on said note was paid up to the twenty-fourth day of March, 1884, being two years from date, but that nothing more has been paid of principal or interest on said note, and that the sum of two thousand five hundred dollars, principal and interest, at ten per cent thereon, from the twenty-fourth day of March, 1884, is now due on said note; 4. That at the time said E. J. Dawne received said note and said mortgage from said H. C. Burch, he, said Dawne, was the agent of said plaintiff, and as such agent received said note and mortgage for the plaintiff, and for his use and benefit; 5. That the consideration of said note and mortgage received by said Burch was paid to him by said E. J. Dawne as the agent of said plaintiff, and that such consideration, when so paid to said Burch, was the money or property of the plaintiff, and not the money or property of Joseph Chandler; 6. That as to said note and mortgage, Joseph Chandler, named as the payee and mortgagee thereof, was and is a fictitious person, who had no interest in or knowledge of the same; 7. That said note and mortgage was never delivered to said Chandler, or assigned by him to the plaintiff; 8. That said H. C. Burch, at the date of said note and mortgage, received from E. J. Dawne the full consideration of said note, and at the time believed that the same was the money or property of Joseph Chandler.

1. On the argument in this court, the only questions of fact which were contested were those presented by findings numbered 6 and 7. For the purpose of determining the correctness of those findings, we have carefully examined the evidence. Joseph Chandler, the alleged payee of said note and mortgage, was examined as a witness, and from his evidence it is apparent that neither the note nor mortgage were at any time delivered to him, nor did he ever see or hear of them until after the commencement of this suit, and to all intents and purposes he was an entire stranger to the transaction. It is equally apparent from Chandler's evidence that he never assigned or delivered said note or mortgage to the plaintiff, and that the pretended assignment offered in evidence is a forgery. But appellant's counsel contend that inasmuch as

the evidence tends to show that said Dawne had, before the signing of the note and mortgage, been engaged in loaning some money for Chandler, that we ought to infer that the money delivered to Burch by Dawne at the time the note and mortgage were signed was Chandler's money, and that Dawne in that transaction was acting as Chandler's agent. If the evidence left any room for such an inference for the purpose of upholding and sustaining the transaction, we would cheerfully adopt it; but unfortunately for the plaintiff it does not. It does not appear from the evidence how much of Chandler's money, if any, Dawne then had in his hands; but it does appear that Dawne's authority to loan had been expressly withdrawn before the date of the note and mortgage, and there is no evidence whatever tending in any manner to prove that, in taking the note and mortgage by Dawne in Chandler's name, he was acting as agent for Chandler. Chandler was entirely ignorant of the transaction, and never in any manner approved or ratified it, or claimed any interest in or benefit from it, or knew of its existence until after this suit was commenced. All the evidence in the record tends to support findings 6 and 7, and we adopt them as the findings of this court upon the points covered by them.

2. But counsel for the appellant contend that, assuming these findings of fact to be correct, the conclusions of the court below as to the law were wrong. They claim that, assuming this note to have been made to a fictitious person, it is valid under section 3191 of Hill's Code, which provides: "Such notes made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker, and all persons having knowledge of the facts, as if payable to bearer." There was such a person as Joseph Chandler. The evidence discloses this fact, but it discloses the further fact that he had no interest in the note, and was not intended to become a party to it. In such case, the payee is to be deemed fictitious: 1 Daniel on Negotiable Instruments, sec. 140. But we need not consider or decide the question of Burch's liability to Shirley on this note. The question was not argued, and we do not wish to decide it without argument. Burch's liability was not contested by respondents' counsel. Their contention was as to the validity of the mortgage, and that presents the real question in this case.

3. Appellant's counsel contend that if one make a note and mortgage complete in every particular, except that the name of the payee and mortgagee are left blank, and they are then delivered to an agent with authority to procure money from any person who will advance it on the securities, that such agent may fill the blanks and deliver the note and mortgage, and that they will be enforced: *Van Etta v. Evenson*, 28 Wis. 33; 9 Am. Rep. 486; *Druny v. Foster*, 2 Wall. 24. These authorities support the proposition stated by counsel, but they only show that a parol authority to fill a blank by the mortgagor's agent before the delivery is good, and that authority to do that act need not be in writing. The mortgage is not delivered in blank, or without the name of the mortgagee being inserted, and therefore it is not perceived how these authorities in any way support the appellant's contention. One of the first requisites of every deed is the necessary parties. There can be no deed without a grantor and a grantee, and the principle applies to all deeds, including mortgages. A mortgagee capable of holding real estate must be named in every mortgage: 1 Hilliard on Mortgages, p. 10, sec. 5. So it was held in *Chauncey v. Arnold*, 24 N. Y. 330, that an instrument in the form of a mortgage, but containing the name of no mortgagee, does not become effectual by its delivery to one who advances money upon the agreement that he shall hold the paper as security for his loan. So a patent to a fictitious grantee is null and void: *United States v. Southern Colorado Coal & T. Co.*, 5 McCrary, 563. And the same principle is held in *Anderson v. Bartels*, 7 Col. 256; *Thomas v. Wyatt*, 31 Mo. 188; 77 Am. Dec. 640; *Kelley v. Bourne*, 15 Or. 476.

4. It has thus far been assumed that this mortgage is to be treated as if made to a fictitious person, or contained the name of no mortgagee capable of acquiring an interest in real property in this state, and such we think must be its legal effect. Joseph Chandler was not a party to the transaction. He had no knowledge of it. He never assented to it, nor did he in any manner authorize it. Neither the note nor mortgage was ever delivered to him, and he had no more knowledge of or interest in the transaction than if made to any other stranger. Under these facts, the mortgage lacked another indispensable requisite,—it was never delivered. Without delivery, it could not take effect or create any valid lien upon the land described in it. Delivery is just as necessary to the completion of the transaction as the signing, sealing, or acknowledging of the

mortgage: *Goodwin v. Owen*, 55 Ind. 243; *Dole v. Bodman*, 3 Met. 139; *Jackson v. Phipps*, 12 Johns. 418; *Freeman v. Peay*, 23 Ark. 439; *Chauncey v. Arnold*, *supra*; 1 Devlin on Deeds, sec. 260; *Fain v. Smith*, 14 Or. 82; 58 Am. Rep. 281. It is not necessary to consider what is a sufficient delivery, or what acts of the parties are requisite to constitute a delivery, for the reason that what these parties did would not constitute a delivery within any rule of law with which we are acquainted, or to which reference has been made by counsel.

5. The court, in effect, found that the note sued on was not made or delivered to Chandler, or by him sold, assigned, or delivered to the plaintiff, but was delivered directly to the plaintiff through the agency of Dawne. This finding is at variance with the allegations in the complaint, and if the evidence had been objected to, or if it had been contested here, the variance would have been fatal to the plaintiff's recovery on the note, on the elementary principle that a party cannot declare one state of facts and recover on other and altogether different facts. The proofs and allegations must agree. But no objections have been made to the decree against Burch on any ground, and for that reason we will not disturb it.

6. Counsel for appellant seemed to assume in his argument that the necessities of the plaintiff's case ought to furnish some reason or excuse for the interposition of equity to aid him. But this is not enough, no difference how pure may have been a party's motives, or how meritoriously he may have acted in the particular transaction. The rules of equity have the same certainty, and are administered with the same regularity, as the rules of law; and to enable a party to obtain relief in that form, he must bring his case fairly under some one or more of the acknowledged heads of equity jurisdiction.

A very careful examination of the whole case leads us to the conclusion that there was no error committed by the court below, and the decree will therefore be affirmed, except the costs will be adjudged as suggested in the concurring opinion of my brother Thayer.

THAYER, J., concurring. The question to be determined in this case is, whether the mortgage which the suit was brought to foreclose ever had any valid inception. It purports to have been executed by H. C. Burch to Joseph Chandler on the twenty-fourth day of March, 1882, to secure the payment of the sum of two thousand five hundred dollars, and interest,

in accordance with the terms of a promissory note bearing even date therewith, which also purported to have been executed by said Burch to the order of Chandler or bearer, and payable two years after date, with interest at the rate of ten per cent per annum, and such additional sum as the court might adjudge reasonable as attorneys' fees.

It appears from the testimony in the case that Burch desired to borrow two thousand five hundred dollars; that one E. J. Dawne, then residing at Salem, wrote him that he would let him have it; that Burch came over to Salem from Yamhill County, where he resided, and signed the note, and signed and acknowledged the mortgage, and left them with Dawne, who gave him the money, after taking out of it the amount of a thousand-dollar mortgage, purporting to have been executed by Burch to the appellant, and taxes, some money paid to Mr. Ramsey, and fifty dollars brokerage fees; that the remainder of the money Burch received was about eleven hundred dollars. Dawne delivered over the note and mortgage to the appellant on or about their date. That on the third day of May, 1882, the appellant duly executed, under his hand and seal, a written acknowledgment of satisfaction of the said thousand-dollar mortgage. Said instrument was duly acknowledged, and contains a recital that said thousand-dollar mortgage was recorded in the office of the clerk of the county of Yamhill on the fourteenth day of January, 1882. The appellant testified as a witness in the case "that Dawne came to him and asked him if he had any money to dispose of; that he told him he had; that Dawne asked him if he did not want some good paper; that he told him he did if it was good; that Dawne said it was good; that he asked him the amount it would take to lift it; that Dawne told him two thousand five hundred dollars, and he paid Dawne the money; that Dawne did not tell him what Joseph Chandler it was; that he supposed that when the note became due Dawne would collect it for him, and for that reason he gave no further thought about it."

It appears there was, at the time of the transaction, a man residing in Salem by the name of Joseph Chandler, who lived near Dawne's place of residence, and that Dawne for some time did business for him in loaning money. Chandler was called by respondents, and testified as a witness in the suit that Dawne loaned the first money for him about 1876 or 1877; that he quit loaning money January, 1882; that he

desired to use what money he had on hand, and to collect in what was outstanding, for the purpose of paying for some real estate in East Portland, which he had negotiated the purchase of; that he got from Dawne thirteen hundred dollars to make up the first payment of two thousand dollars,—that left a balance of two thousand dollars due on the property, to secure which he gave a mortgage; that he was unable to get any more money from Dawne at the time, as the man who had it had died, and Dawne told him he would have to wait until an administrator could sell some property to pay it; that in December, 1881, he gave Dawne instructions to collect in his money, and not to loan out any more for him; that he got from Dawne his last money, \$2,403.94, January 18, 1883; that Dawne had no authority to lend money for him after January, 1882; that he never made any assignment of the note and mortgage in suit; that he first heard of said note and mortgage about the 1st of November, 1885; that appellant was the first one who told him about it. Burch, it appears, did not know until two years after he gave the note and mortgage but that Chandler was the owner and holder of them; Dawne continually so represented the matter to him.

This is an outline of the main facts in the case, and the counsel for the respective parties claim different conclusions therefrom. The appellant's counsel contend that the note and mortgage sued upon were intended to include Joseph Chandler as the real payee of the note and mortgagee in the mortgage, while the respondents' counsel insists that such payee and mortgagee are purely fictitious; that the name "Joseph Chandler" was so used without intending any real party. If the conclusion drawn by the appellant's counsel prevails, it presents the question whether the note and mortgage became effective in the hands of the appellant. Such instruments must be delivered to the party to whom the obligation contained therein is due before they have any force or virtue. If, therefore, said instruments had been intended for Chandler, a delivery thereof to Dawne would have been ineffectual, unless he were the agent of Chandler, and as such agent authorized to receive them for Chandler. And in order to vest the title of them in the appellant through a sale made by Dawne to him, the scope of Dawne's agency must have been sufficient to empower him to make the sale.

It is very doubtful, to say the least, whether the evidence in the case shows that Dawne was invested with any such

agency. The authority to loan Chandler's money would empower Dawne to accept and receive securities therefor; but I hardly think that would authorize him to sell them, and if the testimony of Chandler is to be relied on, Dawne's authority to loan money had been revoked at the time of the transaction with Burch. If, however, these conjectures are wrong, still I am very positive that it cannot be maintained that the evidence proves that the money advanced to Burch belonged to Chandler. The testimony of the latter shows very conclusively that it did not. It shows that Dawne had at the time no money in his hands belonging to Chandler available for any such purpose; that Chandler had directed him not to lend any more of his money, but to collect in what was outstanding, and pay it over to him; besides, if it had been Chandler's money, and it had been intended to take the note and mortgage to him, he would doubtless have been informed in regard to the loan.

The appellant, at about the time the loan was made, advanced to Dawne money, he says, to buy the security, and it is very evident that that was the money which was advanced to Burch. Why Chandler's name was inserted in the note and mortgage is very peculiar; but it seems to have been an irregular mode which parties engaged in loaning money through Dawne and others had adopted. They probably considered it an honest way to do business; but the courts must consider it from a legal standpoint. The result of the transaction, if Chandler's name was used without his knowledge or consent, was to render the note and mortgage inoperative. One person cannot make a contract with another without the knowledge and consent of the latter; it must be a mutual agreement between the contracting parties. A contract in form, with a person who is a stranger to it, stands upon the same footing as an assumed contract with a fictitious person. It would lack the essential elements of a contract, — the meeting of the minds of the parties.

There is but one exception to this rule that I am aware of, that is in case of a promissory note made payable to the order of the maker thereof, or to the order of a fictitious person, and negotiated by the maker. The statute gives to such note the same effect and validity as against the maker, and all persons having knowledge of the facts as if payable to bearer. But the statute does not extend to mortgages. They must be upheld, if at all, by general rules applicable to contracts. The

note in suit having been made payable to bearer may possibly, under the provisions of the statute, be held valid in the hands of the appellant. The circuit court seems to have so regarded it, and as the respondents have not appealed from that part of the decree, it is not necessary to consider the question. A question has, however, occurred to me in considering the appeal relative to the costs of the suit.

The rule of this court is, that the prevailing party in equity cases will usually be entitled to costs against the losing party; but in view of the fact that the appellant is subjected to a severe hardship in being deprived of a lien upon the premises for his debt, that the respondents are profited thereby, that he did not act dishonestly or in bad faith in the transaction out of which the debt arose, and that his misfortune has been occasioned by the bad advice he received concerning it, I think his case should be made an exception to the general rule upon that subject, and that his taxable costs and disbursements in the suit and on the appeal should be paid out of the proceeds of the sale of the mortgaged premises, with the other costs and disbursements therein, and that no costs or disbursements should be taxed against him in this court or in the circuit court.

DELIVERY OF MORTGAGE CANNOT TAKE PLACE when the mortgagee has no knowledge thereof: *National State Bank v. Morse*, 73 Iowa, 174; 5 Am. St. Rep. 670; *Woodbury v. Fisher*, 20 Ind. 387; 83 Am. Dec. 325.

DELIVERY OF MORTGAGE, TO BE VALID, MUST BE VOLUNTARY, — that is, made with the assent and in pursuance of the intention of the mortgagor to deliver it: *Fisher v. Beckwith*, 30 Wis. 55; 11 Am. Rep. 546.

OMISSION OF MORTGAGEE'S NAME FROM MORTGAGE, EFFECT OF: See *Green v. Garrington*, 16 Ohio St. 548; 91 Am. Dec. 109, note.

DECREE WILL NOT BE REVERSED FOR ERROR IN IT which works no injury to the losing party: *Schutz v. Sweeny*, 19 Nev. 359; 3 Am. St. Rep. 888.

MITCHELL v. SCHOONOVER.

[16 OREGON, 211.]

ATTACHMENT. — LEVY OF ATTACHMENT IS NOT DISSOLVED by the death of the defendant, unless some statute expressly so declares.

REVIVAL OF ACTION. — IF PARTY TO ACTION DIES, AND CAUSE OF ACTION SURVIVES, ADVERSE PARTY may at any time within one year thereafter cause the action to be continued by or against the personal representative of such deceased party.

JUDGMENT RENDERED BY COURT OF GENERAL JURISDICTION AGAINST PARTY AFTER HIS DEATH is not for that reason void. It may be erroneous, but until reversed by some appropriate proceeding, it is valid.

NUNC PRO TUNC ENTRY OF JUDGMENT. — IF PLAINTIFF IN ACTION IS ENTITLED TO JUDGMENT without further contest, or if by the court's delay he fails to obtain judgment when entitled to it, and the adverse party dies, it is the duty of the court to enter judgment in his favor as of a time when the adverse party was living.

TIME. — LAW DOES NOT IN GENERAL REGARD FRACTIONS OF DAY, except in cases where the hour itself is material, as where priority of judgments and the like is in question.

FOR PURPOSE OF DEFEATING JUDGMENT RENDERED by a court of general jurisdiction, the legal representative of a deceased party will not be heard to allege that on the day of the rendition of such judgment, but at an hour previous thereto, his intestate died.

Baker, Shelton, and Baker, and George G. Bingham, for the respondent.

J. R. Crites, for the appellant.

STRAHAN, J. On the fourteenth day of June, 1886, the plaintiff commenced this action against Thomas P. Baird and M. B. Baird, to recover eighteen hundred dollars and interest, due on a promissory note, and on the same day sued out a writ of attachment against the property of the defendants. The summons, as well as the attachment, were served in Union County, Oregon, on the next day after they were issued. On the twenty-seventh day of June, 1886, the defendants appeared by their attorney in fact, Willis Skiff, and filed a demurrer to the complaint, which was on the first day of October, it being the October term of said court, 1886, overruled. On the sixth day of October, 1886, the plaintiff took judgment against the defendants for want of an answer. On the twenty-sixth day of November, 1886, Nelson Schoonover filed a petition entitled in said action, reciting the above facts; and further, that on the sixth day of October, 1886, M. B. Baird died at Union County, Oregon, and after his death plaintiff took judgment against said deceased, and an order for the sale of the attached property which belonged to said deceased; that the petitioner was on the 13th of October, 1886, duly appointed administrator of the estate of M. B. Baird, deceased, by the county court of Union County, Oregon.

The prayer in substance is for an order allowing petitioner to appear in said action as the duly qualified administrator and legal representative of said deceased, and that further proceedings in said action be taken against the petitioner as such legal representative. Thereafter, on the tenth day of December, 1886, the plaintiff by his attorneys filed a motion

to strike Schoonover's petition from the files, which motion was denied on the fourteenth day of December, 1886. Afterwards the plaintiff filed a motion to strike paragraph 5 from Schoonover's petition, which recited that judgment was taken against said M. B. Baird after his death. On the twenty-first day of February, 1887, this motion was allowed by the court, and paragraph 5 was stricken out; and it was further ordered that said cause as to said M. B. Baird, deceased, be and the same is hereby continued in the name of Nelson Schoonover, as administrator of said estate of M. B. Baird, deceased. On the twenty-third day of February, 1887, Nelson Schoonover filed a motion to vacate the judgment as to M. B. Baird, deceased, for the reason that the judgment against said M. B. Baird is void, having been rendered after his death. In support of this motion numerous affidavits are filed. If said affidavits are competent or material, or can be considered, they tend to show that M. B. Baird died at Union, in Union County, Oregon, on the sixth day of October, 1886, at about the hour of five o'clock, A. M., of said day, and that the judgment was not entered until after the hour of nine o'clock, A. M., of the same day.

The plaintiff filed a motion to strike out these affidavits; the same was overruled, and Nelson Schoonover as administrator was allowed ten days in which to file an amended motion and affidavits. Within the time allowed, an amended motion and some additional affidavits were filed. Afterwards, on the twenty-third day of July, 1887, both motions were denied by the court, from which last-named order, overruling his motion to vacate the judgment as to M. B. Baird, deceased, Nelson Schoonover has appealed, and assigns for error the action of the court in overruling his said motion. Schoonover's amended petition to vacate said judgment shows that said M. B. Baird was insolvent at the time of his death, and that the attachment was levied wholly upon the real property of said M. B. Baird, and not upon any of the property of Thomas P. Baird; that fully three thousand dollars of M. B. Baird's debts were due to sureties of said M. B. Baird, who had made advances for him, etc.

The application of Schoonover to vacate the judgment seems to be founded upon two theories: 1. That the death of M. B. Baird dissolved the attachment; and 2. That the judgment is void, because it is alleged that he died a few hours before the judgment was entered up.

It may be doubted whether or not the order made in this case refusing to vacate this judgment is an appealable order. "A final order affecting a substantial right, and made in a proceeding after judgment or decree for the purpose of being reviewed, shall be deemed a judgment or decree": Hill's Code, sec. 535. It is not perceived how this order affected a substantial right. No defense to the action was offered or proposed, nor did the appellant offer an answer of any kind. But this question was not suggested at the argument, and the decision will not be placed on this ground.

1. It is conceded that there is no provision of the code which declares that an attachment will be dissolved by the death of either party. If such a result follows death, it must be gathered inferentially from some provision of the code, because it is nowhere expressed; but it will be most convenient to see first what effect the death of a party has upon a pending action. Section 38 of Hill's Code declares: "No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, allow the action to be continued by or against his personal representatives or successor in interest." And by section 144 it is provided that "the plaintiff may at the time of issuing the summons, or any time afterwards, have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered. . . . From the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith, for a valuable consideration, of the property, real and personal, attached."

If effect be given to all of these provisions of the code, the attachment is not dissolved by death. If a party die, the adverse party may, within one year thereafter, cause the action to be continued by or against the personal representatives of such deceased party. And the effect of a judgment in such action is to subject the property attached to its payment. There is some conflict amongst the authorities on the subject, but I think the decided weight of authority, as well as the better reason, is to the effect that an attachment is not dissolved by death, unless some statute expressly so declares. In *More v. Thayer*, 10 Barb. 258, a complaint had been filed, and an attachment issued and served, but no summons had been

served; but the court had acquired such jurisdiction of the action by the allowance of the provisional remedy of attachment that the defendant's administrator could be brought in and the attached property subjected to the judgment. So in *Perkins v. Norvell*, 25 Tenn. 151, it was held that the death of the defendant did not dissolve the attachment, and that the attached property might be subjected to the payment of the debt by bringing in the heirs by means of a *scire facias*. In *Thacher v. Bancroft*, 15 Abb. Pr. 243, an attachment was issued, and on the same day the defendant died. Subsequently his executor appeared and defended the action, and judgment was rendered in favor of the plaintiff.

In passing on the question whether the attachment held the property or not, the court said: "The attachment remains in force, notwithstanding the death of the defendant; the revival of the action by the appearance of the executor enables the plaintiff to obtain his judgment. Payment of such judgment out of the attached property can only be obtained through an execution by which the attached property is to be sold." So in *Kennedy v. Raguet*, 1 Bay, 484, an attachment was issued and certain persons were garnished. The garnishees made default, and judgment went against them. About the time, or immediately after, the issuing execution, it was discovered that Raguet, the principal debtor, had died at Bordeaux before the signing of judgment against the garnishees. They therefore moved to set aside the judgment and execution against them, for the reason that the death of the defendant before judgment abated the action and dissolved the attachment. But their motion was disallowed, and they were held liable on the judgment. So, also, in *Holman v. Fisher*, 49 Miss. 472, it was held in effect that if a defendant die after the service of a writ of attachment, the writ is not abated, but may proceed to judgment, the court holding that the proceeding thereby became strictly *in rem* under the statute of that state. And the like rule was held in *White v. Heavner*, 7 W. Va. 324, the court saying: "The death of Henry O'Middleton, the debtor, after the attachment was levied on the real property, did not dissolve the attachment or the lien thereof upon the realty attached."

2. But it is argued that this judgment is void, and for that reason it ought to have been set aside. But the authorities do not sustain this position. It must be remembered that the judgment itself is not before us, for the reason the appellant

took no appeal from it. We are not, therefore, required or permitted to say whether it is reversible for error or not. The only necessary point for us to consider on this branch of the case is, whether or not the court below erred in overruling the appellant's motion for the reason stated therein. The decided weight of authority seems to be to the effect that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after the death of such party, the judgment is not for that reason void. It may be erroneous, but until reversed by some appropriate proceeding it is valid.

In *Reid v. Holmes*, 127 Mass. 326, the question came before the supreme court of that state, and it was held the judgment was not void. The court said: "If the fact, agreed in the case stated, of the death of the defendant after the default and before the judgment is competent to be considered, it does not show that the judgment is absolutely void. The court, at the time of bringing the former action, had jurisdiction of the subject-matter and of the parties, and might, after the death of the defendant, have rendered judgment against him as of a previous term: *Tapley v. Martin*, 116 Id. 275; *Kelly v. Riley*, 106 Id. 339, 341; 8 Am. Rep. 336; *Tapley v. Goodsell*, 122 Id. 176-181; or the judgment actually entered might, on motion of the plaintiff, have been amended so as to stand as a judgment *nunc pro tunc*, or have been vacated and the administrator summoned in to defend the action": *Stickney v. Davis*, 17 Pick. 169. So in *Case v. Ribelin*, 1 J. J. Marsh. 29, it was held that such a judgment was not void, but erroneous; that the error consisted of matter of fact, which not appearing on the record, the court could not notice it, and that the same was to be corrected by a writ of error *coram vobis*. *Yaple v. Titus*, 41 Pa. St. 195, 80 Am. Dec. 604, is to the same effect. And other authorities announce the same principle: *Hayes v. Shaw*, 20 Minn. 405; *Coleman v. McAnulty*, 16 Mo. 173; 57 Am. Dec. 229; *Camden v. Robertson*, 3 Ill. 507.

3. But under the state of this record at the time M. B. Baird is said to have died, it was the duty of the court to see that the plaintiff was not prejudiced by its delay in entering judgment. The court overruled the defendant's demurrer to the plaintiff's complaint on the first day of the October term. They did not apply for leave to answer or plead further. At the time the demurrer was overruled, the plaintiff was then entitled to a judgment according to the prayer of his complaint.

His cause of action stood admitted upon the record, and it was the duty of the court to enter judgment against the defendant according to the facts as they were alleged in the complaint. If while the cause is in this condition the defendant dies, the plaintiff is not to lose the fruits of his litigation, and if necessary, it is the duty of the court to enter judgment *nunc pro tunc* as of the previous term, or, under our practice, an earlier day in that term. This is the common-law rule of practice, and the code has not changed it.

In *Blaisdell v. Harris*, 52 N. H. 191, after verdict for the plaintiff, the case was transferred to the law term for the consideration of the full bench, upon exceptions taken by the defendant. While the cause was thus pending in the law term, the defendant died. Afterwards, the defendant's exceptions being overruled, it was held that the plaintiff should have judgment as of the previous term when the verdict was rendered. In *Tapley v. Martin*, 116 Mass. 275, it was held that if after verdict for the plaintiff the defendant dies, the court has power to pass upon the exceptions alleged by him, and if justice requires, to enter judgment *nunc pro tunc* as of the term when the verdict was rendered, although no administrator had been appointed in said estate. And the same principle was announced in *Wilson v. Myers*, 4 Hawks, 73; 15 Am. Dec. 510. And this practice prevails generally: *McLean v. State*, 8 Heisk. 22; *Spalding v. Congdon*, 18 Wend. 543; *Currier v. Inhabitants of Lowell*, 16 Pick. 170; *Griffith v. Ogle*, 1 Binn. 172; *Tooker v. Duke of Beaufort*, 1 Burr. 146; 2 Tidd's Practice, 932. Generally the law does not regard fractions of a day, except in cases where the hour itself is material, as in case where priority of judgments, or priority of lien, and the like, is in question: *Marvin v. Marvin*, 75 N. Y. 240; *Judd v. Fulton*, 4 How. Pr. 298; *Phelan v. Douglass*, 11 How. Pr. 193; *Columbia Turnpike Road v. Haywood*, 10 Wend. 422; *Hughes v. Patton*, 12 Wend. 234; *Small v. McChesney*, 3 Cow. 19; *Clute v. Clute*, 3 Denio, 263; *Blydenburgh v. Cotheal*, 4 N. Y. 418; *Jones v. Porter*, 6 How. Pr. 286.

Counsel for appellant have not cited a single authority from any book holding that, for the purpose of defeating a judgment of a court of general jurisdiction, the legal representative of a deceased defendant may allege that on the same day and at a previous hour before the rendition of the judgment his intestate had died, and my own researches have failed to find any authority for that position. Our views on the merits be-

ing adverse to the defendant, we have not thought it necessary to consider or decide the technical objections urged as to the form in which the questions are presented.

There being no error prejudicial to the rights of the appellant, the judgment appealed from must be affirmed.

DISSOLUTION OF LEVY OF ATTACHMENT BY DEATH: See *Waitt v. Thompson*, 43 N. H. 161; 80 Am. Dec. 136, and note 139-143; *Myers v. Mott*, 29 Cal. 359; 89 Am. Dec. 49, and note 57.

ERRONEOUS JUDGMENT IS VALID until reversed by some appropriate proceeding: *Peck v. McLean*, 36 Minn. 228; 1 Am. St. Rep. 665.

JUDGMENT RECOVERED AGAINST DECEASED PERSON is not void, but only voidable: *King v. Burdett*, 28 W. Va. 601; 57 Am. Rep. 687; *Taylor v. Snow*, 47 Tex. 462; 26 Am. Rep. 311.

TIME, HOW COMPUTED: *Teucher v. Hiatt*, 23 Iowa, 527; 92 Am. Dec. 440. The law will regard fractions of a day when important in the settlement of conflicting interests: *Gibson v. Keyes*, 112 Ind. 568; *Wood v. Lordier*, 115 Id. 519.

POOLE v. NORTHERN PACIFIC RAILROAD COMPANY.

[16 OREGON, 261.]

RAILROAD COMPANY MAY PRESCRIBE RULE REQUIRING ALL PERSONS BEFORE TAKING PASSAGE on its passenger trains to procure tickets, and to exhibit them to the conductor at all proper times to entitle them to ride, and in default thereof to pay an additional sum, when it has furnished the necessary conveniences and facilities to travelers for procuring tickets.

IF RAILROAD COMPANY HAS FAILED OR NEGLECTED TO FURNISH TRAVELER OPPORTUNITY to procure a ticket, and he applies for passage or enters its passenger train without having such ticket, but offers to pay the usual fare, the company cannot lawfully reject or eject him.

ANY RULE OR REGULATION WHICH RAILROAD COMPANY HAS RIGHT TO MAKE for its own convenience, or the management of the business, and which the public are bound to obey, must be reasonable, and the company is bound to furnish all the conveniences, opportunity, and means necessary to comply with it. Unless it does this, the rule is unreasonable.

Emmons and Emmons, and C. M. Idleman, for the respondent.

Dolph, Bellinger, Mallory, and Simon, for the appellant.

LORD, C. J. This was an action to recover damages for the unlawful expulsion of the plaintiff from the passenger-cars of the defendant. After issue joined, the cause was tried, and resulted in a verdict and judgment in favor of the plaintiff, from which the defendant appeals to this court.

In substance, the facts certified to us are these: On the

thirteenth day of August, 1885, the plaintiff entered the cars of the defendant at Holbrook station, in Multnomah County, intending to go to Portland, a distance of thirteen miles. Holbrook station was not a ticket-office, nor could any ticket be procured at it, nor had the plaintiff any ticket. When the conductor applied to the plaintiff for his ticket, he offered and handed to the conductor fifty cents, and the conductor told him that the fare when paid on board of the cars was seventy-five cents, twenty-five of which would be refunded to the plaintiff by applying to any ticket-office of defendant, and presenting a rebate check which he would issue to him. The plaintiff declined to pay or make such deposit of twenty-five cents, and thereupon the conductor told him that he could not proceed on the train unless he did so. The plaintiff then told the conductor that if he was put off the train he would make the company pay for it, whereupon the conductor offered to return said fifty cents, which the plaintiff refused to accept, and the conductor then left the same on the seat where the plaintiff was sitting; that the conductor went on through the train, and afterwards returning, again demanded said twenty-five cents, and informed the plaintiff that unless he paid the same he would have to get off; that plaintiff still refused to comply with the request of the conductor. When the train reached the next station the conductor compelled the plaintiff to leave the train; that after plaintiff left the cars, the conductor finding the fifty cents on the seat, deposited the same for safe-keeping with the express messenger on the train.

There was no evidence of any malice on the part of the defendant, or any of its agents, or of any assault on the plaintiff, or insult offered to him, other than the fact that the conductor put his hand on the plaintiff's arm, and in a quiet and orderly manner requested him to leave the train, and the plaintiff, believing that he would be ejected by force if he longer refused, left the train. After being thus ejected from the train at Linton, the plaintiff not being able to procure a conveyance, walked to Portland, a distance of eight miles, and afterwards, on the same day, met the conductor, and stated that he bore no malice or resentment toward him personally, but considered that he was obeying instructions, etc. There was evidence tending to prove that the defendant had for a long time in force a rule and regulation providing that where passengers got aboard of the defendant's cars without having procured tickets, an additional sum of twenty-five cents to the regular

fare would be demanded, for which a rebate check would be issued to the passenger so entering without a ticket, which rebate check would entitle the holder, upon presentation thereof at any ticket-office on defendant's line, to a return of said twenty-five cents, and that this rule was enforced as to all passengers getting on defendant's train without tickets.

Upon this state of facts, the defendant asked the court to instruct the jury as follows: "Where a railroad company demands of a passenger getting on board its cars without a ticket a deposit of a small sum in addition to the price of the ticket, but at the same time issues to such passenger what is called a rebate check for the deposit, which entitles the holder to a return of the money so deposited by applying therefor to any ticket-office of the company, this additional sum demanded on deposit required is not additional charge of fare."

The court refused to give this instruction as asked, but gave the same in modified form by adding as follows: "But such regulation, applied to a station where passengers are received but no tickets sold or are obtainable, is an unreasonable rule, and the demand for such deposit, under such circumstances, was an unlawful demand."

The principle stated in this modification involves the main question to be decided. There are certain duties which a railroad corporation assumes in consideration of the franchise conferred upon it by the state. It owes to the public the duty of providing suitable cars for passengers, stations and depots for taking passage, and to afford proper facilities for procuring tickets. At all stations along the line of the road at which it is usual for passenger trains to stop, the citizen has the right to enter and become a passenger by procuring a ticket or paying his fare. For its own safety and convenience and that of the public, a railroad company may make reasonable rules and regulations for the management of its business and the conduct of its passengers. It may prescribe as a rule, and require all persons, before taking passage on its passenger trains, to procure tickets, and to exhibit them to the conductor at all proper times, to entitle them to ride, and in default thereof, may charge an additional sum. Such a rule may be necessary for its own protection against the fraud and dishonesty of its agents or conductors, and to avoid the inconvenience of collecting fares upon its trains in motion, while it imposes no hardship on the passenger. Necessarily, such a rule and its enforcement plainly implies or assumes that the company has

provided the proper facilities or opportunity for travelers to procure tickets to enable them to comply with such regulation; and when it has furnished proper conveniences and facilities to travelers for procuring tickets, the rule is reasonable, and works no hardship or inconvenience. But a company which has provided a station without a ticket-office, at which its passenger trains stop, has not put it in the power of the traveler to comply with such regulation, and it would be unreasonable to apply it to him when he tendered the usual fare.

To allow a railroad company to enforce a rule requiring passengers to procure tickets before taking passage, and in default thereof to pay an additional sum, for which a rebate check is issued, when the company has furnished no ticket-office, and thus make it impossible for the traveler to procure a ticket and to comply with its rule, would be punishing the traveler for its dereliction of duty. Such a rule, as applied to such a station, would be unreasonable, vexatious, and oppressive. Without the necessary conveniences or facilities for procuring tickets, the traveler cannot be in fault, nor the spirit or equity of such rule violated; for such a rule is manifestly only reasonable when applied to stations where tickets may be procured. To hold otherwise, would be to authorize the company to require of the passenger to do that which the company had made it impossible for him to do, and then, for failing to do it, to pay a penalty to the company. If it has failed or neglected to furnish the traveler the opportunity to procure a ticket, and he applies for passage or enters their passenger trains without having such ticket, but offers to pay the usual fare, the company cannot lawfully reject or eject him. The right of the company to make any rule or regulation for its own convenience, or the management of its business, which the public are bound to obey, such rule or regulation must be reasonable, and the company is bound to furnish all the conveniences, opportunity, and means necessary to comply with it. Unless it does this, the rule is unreasonable.

Upon the facts as presented by this record, there was no error in the instruction as modified. Nor do we discover any error in the instruction as to damages; that is, that the plaintiff could only recover for the actual damages which he had sustained.

The judgment must be affirmed.

RAILROAD COMPANY—RIGHT OF CONDUCTOR TO EJECT PASSENGER for refusing to pay extra fare: *Atchison etc. R. R. Co. v. Gants*, 38 Kan. 608; 5 Am. St. Rep. 780, and cases collected in note 794; *Texas etc. R. R. Co. v. Bond*, 62 Tex. 442; 50 Am. Rep. 532; *Bland v. Southern Pacific R. R. Co.*, 55 Cal. 590; 36 Am. Rep. 50.

PASSENGER UNABLE TO PURCHASE TICKET because of failure of railroad company to furnish him an opportunity to do so may pay the excess demanded on the train under protest, and recover it by suit, or refuse to pay it, and hold the company liable in damages for an ejection: *Forsee v. Alabama etc. R. R. Co.*, 63 Miss. 66; 56 Am. Rep. 801.

RAILROAD COMPANY IS ENTITLED TO MAKE RULES for conducting its affairs, if they be reasonable, not conflicting with any legal liability, and not exempting from liability for negligence or improper conduct: *N. & W. R'y Co. v. Wysox*, 82 Va. 250.

SOVERN v. YORAN.

[16 OREGON, 269.]

AT COMMON LAW, FINDER OF LOST PROPERTY HAS VALID CLAIM THERETO against all the world except the true owner, and was bound to hold it for the owner, and was liable for misdelivery. This rule is modified by the provisions of the Oregon Code, secs. 3707-3711.

STRICTLY SPEAKING, IT IS ONLY MONEY OR GOODS WHICH HAVE BEEN LOST that can be said to be found. And lost property is that which the owner has involuntarily parted with, and not property which he has intentionally concealed for safe-keeping in the place where found.

MONEY OR GOODS, WHEN FOUND, ALTHOUGH OWNER IS UNKNOWN, WHICH HAS BEEN HIDDEN in the earth by him for safe-keeping, is not property of which he has involuntarily parted with the possession, or lost property, to which the provisions of the Oregon statute as to lost property (Code, secs. 3707-3711) are applicable; and in such case, if the finder undertakes to treat or deal with it as lost property, his acts thereby will not impair the title of the true owner, or defeat his right to recover it.

ID.—WHERE ONE FINDS MONEY HID in the earth, and the surroundings evidence that it was intentionally deposited in the place found for safe-keeping, but the finder, not knowing to whom it belonged, and there being no marks on it, or other indication by which the owner could be known, treats it as subject to the provisions of the statute as to lost property, and acting in good faith, pursuant to the statute, delivers it as therein prescribed, he is not liable for a conversion of the money.

J. K. Weatherford and L. Bilyeu, for the appellant.

G. B. Dorris and H. Y. Thompson, for the respondent.

LORD, C. J. This was an action of trover, brought by the plaintiff as administrator against the defendant, for the conversion of two certain packages of money, alleged to have been the property of the deceased. After denying the facts thus alleged, the defendant set up as a defense in substance

these facts: That at the time alleged, upon the premises owned and occupied by the defendant, one Hugh Gray and one Darwin E. Yoran each found a purse of money, and that they delivered said packages to the defendant to be disposed of according to law, and subject to their claim as such finders; that the defendant as such holder of the money, in compliance with the statutes in such case, did give the required notice to the clerk of the county by posting in two public places, and by publication in the Oregon State Journal, etc.; that no owners appeared within one year from the date of said notice and claimed said sums of money; and that before any notice was given to the defendant of any claim to the same, and before the commencement of this action, in compliance with the statutes aforesaid, did deliver to the county treasurer one half of said money, and to the said Gray and Yoran the other half; that said sums of money were delivered to the defendant as bailee of said finders, and that he delivered that portion to which each was entitled, and paid over to the treasurer the respective sums as aforesaid, etc.

In the way of new matter, the reply alleged that the deceased in her lifetime placed the said purses in the places mentioned for safe-keeping, and that she owned or was lawfully in possession of said premises at said time, and that said money was never at any time lost. By the evidence in the bill of exceptions, it appears that the money in controversy was found in two cans, under the floor in the barn, and that the finders were two boys, who thus substantially describe the circumstances of the finding.

One of them testifies: "There was one plank that was not nailed down, and had a small hole in it as though the rats had gnawed it; it was about two feet long; when that piece of flooring was lifted up, Hugh Gray found the can of money. We counted it, and there was \$925.85 in gold and silver; afterwards I found another can about a half foot from the one Hugh Gray found; seemed to be a yeast-powder can; it was about five inches long, and had in it one thousand dollars in gold coin. I took the money to my father and handed it to him." After inquiring of the boys where they had found the money, etc., the defendant testified: "I took it and brought it to the county treasurer, and related to him the circumstances, and he placed it in his safe; then I returned home." And in describing the place of the finding, said: "I found that a plank had been sawed into diagonally to form a miter

so it would not drop through, and a little pit had been dug six or eight inches deep, and that it had been filled with chaff and hay feed in the manger in which the cans had been placed. I then brought the money to the treasurer's safe and deposited it, and on Monday following gave the notices," etc.

The court instructed the jury, among other things, that "if the defendant was proceeding honestly under the supposition that the money was lost property, it would not of itself constitute conversion, although he was mistaken about the facts of the money being lost, and in his attempt to proceed in reference to the law of lost money," to which the plaintiff excepted.

After retiring to consider their verdict, the jury returned with this result: To the question: "Was Johanna Goodchild at the time of her death the owner of the property described in the complaint in this action?" Answer. "Yes." To the question: "Was there any conversion of the money in question by the defendant?" Answer. "No"; and also returned a verdict in favor of the defendant. From this statement it is sufficient to say that the contention of counsel for the plaintiff was, that the answer of the defendant, and the evidence offered by him, establishes in law conversion, and that the court should have instructed the jury to that effect, and not as above stated. They proceed upon the hypothesis that the money was not lost, but intentionally deposited in the place mentioned for safe-keeping, and that the admitted acts of the defendant in relation thereto were inconsistent with the rights of the true owner, and in law constituted a conversion.

Ever since the decision of Lord Chief Justice Pratt in *Armory v. Delamirie*, 1 Strange, 505, it seems to be settled law that the finder of lost money has a valid claim to the same against all the world except the true owner, and generally it may be said that the place in which it is found creates no exception to this rule. "But property," said Trunkey, J., "is not lost in the sense of this rule if it was intentionally laid on a table, counter, or other place by the owner, who forgets to take it away, and in such case the proprietor of the premises is entitled to retain the custody. Whenever the surroundings evidence that the article was deposited in its place, the finder has no right of possession against the owner of the building": *Hamaker v. Blanchard*, 90 Pa. St. 379; 35 Am. Rep. 664. Strictly speaking, it may be said that before a thing can be found it must have been lost; and property which the owner has simply or intentionally laid down, or deposited in some

place, and for the time forgotten where it was left or put, in legal intendment can hardly be considered as lost. "The loss of goods in legal and common intendment," said Rees, J., "depends upon something more than knowledge or ignorance, the memory or want of memory of the owner as to their locality at any given moment. If I place my watch or pocket-book under my pillow in a bed-chamber, or upon a table or bureau, I may leave them behind me indeed, but if that be all, I cannot be said with propriety to have lost them. To lose is not to place or put anything carefully and voluntarily in the place you intend, and then forget it; it is casually and involuntarily to part from the possession, and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there": *Lawrence v. State*, 1 Humph. 229; 34 Am. Dec. 644.

The distinction to be noted is between the cases in which the thing or property is actually lost, and those in which it is intentionally left or deposited in its place; cases in which, as Baron Parke said, "the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict." Upon the theory that the case in hand is parallel in principle with the class last named, it may be argued that the defendant, being the owner of the property in which the money was deposited, was entitled to the possession as against the finders, and their delivery to him did not make him in law bailee for them, but required him, as was said in *McAroy v. Medina*, 11 Allen, 548, "to use reasonable care for the safe-keeping of the same until the owner shall call for it," and that when he undertook to treat it as lost property, and actually delivered one half of the money to the county treasurer, and the other half to the finders, he acted in derogation of the rights of the true owner by the exercise of dominion over it, which rendered him answerable in trover for conversion.

At common law, the finder of lost property was bound to hold it for the true owner, and was liable for misdelivery. In *Isaack v. Clark*, 2 Bulst. 306, Lord Coke says: "When a man doth find goods, it hath been said, and so commonly held, that if he doth dispossess himself of them by this, he shall be discharged; but this is not so, as appears by 12 E., 4th vol., 13, for he which finds goods is bound to answer him for them who hath the property; and if he deliver them over to any one,

unless it be unto the right owner, he shall be charged for them, for at the first it is in his election whether he will take them or not into his custody, but when he hath them one only hath the right unto them, and therefore he ought to keep them safely; if a man, therefore, which finds goods, if he be wise, he will then search out the right owner of them, and so deliver them unto him; if the owner comes unto him and demands them, and he answers him that it is not known unto him whether he be the true owner of the goods or not, and for this cause he refuseth to deliver them, this refusal is no conversion, if he do keep them for him."

The duty of the finder to ascertain who is the true owner before he makes a delivery, and his liability in case of misdelivery, is here clearly stated. But our statute, as we shall presently see, has innovated this rule, and the finder, after doing the things prescribed for the purpose of ascertaining the true owner, is required, after the expiration of a year, to turn over one half to the county, and entitled to keep the other half of such lost property; and in case of neglect or failure to do so, the county may bring an action against such finder to recover the same. So that if the owner should afterwards appear, such acts upon the part of the finder, done in pursuance of law, would not render him liable for conversion. Nor at common law, "if the owner comes unto him and demands them," and he does not know him, and for this reason refuses to deliver such lost property to him, is his refusal a conversion? In such case, acting in good faith and with fairness, his mistake cannot be urged against him, and will not render him liable in trover.

In some important particulars, the facts of the case in hand are more akin to what is known as treasure-trove. That is, "where any money is found hid in the earth, but not lying on the ground, and no man knows to whom it belongs." Now, the surrounding facts indicate that the money was intentionally deposited in the place where found, for concealment. Until after the money was distributed as stated, the owner was unknown. So that during the possession of the defendant there was present all the elements constituting treasure-trove. There was the hiding, the secrecy, that unknown owner, in fact, dead owner and unknown representatives. It is only when the owner appears or is shown that the title of the king vanishes as heir to him who was presumed to be dead; in a word, when the owner is made known, it ceases to be treasure-trove.

But while that fact lies hid, while the case stands of money found hid in the earth, and the owner unknown, after diligent search, and the finder treats the property as treasure-trove, and then afterwards the owner appears, the only effect is to destroy the character of such property as treasure-trove, and thus defeat the title of the king or sovereign; but it does not render the finder liable for conversion. His mistake, if such it may be called, like the refusal of the finder to deliver on demand lost property when the owner is unknown to him, is no conversion, for he is justified in his conduct at the time in treating it as treasure-trove, by the presence of all the elements which constitute it such.

The record shows that the defendant bought the property at an administrator's sale, and entered into possession, and while thus in possession, the boys found the money in the manner and under the circumstances already stated. It was delivered by them to the defendant as their agent or bailee for the purpose of ascertaining its owner. Neither he nor they knew who the owner was, nor was there any marks on the money or otherwise by which the owner could be known. What was the defendant to do? Here was money evidently deposited for concealment found upon his premises, and the owner of it unknown. Our statute provides that "if any person shall find any money, etc., and if the owner thereof is unknown, such person shall, within five days after finding such, give notice thereof in writing to the county clerk, and also cause a notice thereof to be posted in two public places," etc. And if the amount found exceed fifteen dollars, he "shall, in addition to the preceding requirements, within fifteen days, etc., cause notice thereof to be published in a newspaper printed in the county, etc., and if no person shall appear to claim the same, etc., within two months, he shall procure the appraisal thereof by a justice of the peace," etc.; and further, "if the owner of such lost money, etc., appear within one year after notice given, etc., and make out his right thereto, he shall have restitution, etc.; but if such owner shall not appear within one year, then the finder shall pay one half, after deducting all legal charges, to the treasurer of the county, etc., and in case of neglect to do so on demand, 'after the expiration of the year,' the same may be sued for by the county": Code, secs. 3708-3710.

The defendant, not knowing to whom the money belonged, and there being no marks or other *indicia* by which the owner could be ascertained, treated the money as subject to

the provisions of this statute. The language of the first section is, that "if any person shall find any money or goods, and if the owner of it be unknown, such person shall," etc. This seems to have been interpreted to mean that when money or goods is found, and the owner of it is unknown, it applies as well to money or goods hidden in the earth which had been found and whose owner was unknown as to lost property. Taking this section alone, it might be argued that the intent is to treat property hidden and found as lost property when the owner is unknown, or to put them on the same footing. In a word, that it contemplates that he who "finds" must necessarily have had no knowledge of the existence of such money or goods until found, and the owner of which is unknown, and that as to such person, whether the money or goods be lost or hidden, it occupies the same relation as to him, and could not have come into his possession except by finding; and consequently, money or goods when found may include money or goods hidden in the earth or lost upon it; and in either case, if the owner be unknown, the section cited is broad enough to cover either case.

In this view, if money be hidden in the earth for safe-keeping, unless the owner put some marks or other *indicia* upon it by which he may be identified or made known, the finder would be justified in treating it as lost property. But this construction is hardly tenable, for strictly speaking it is only money or goods which have been lost that can be said to be found, and the succeeding provisions of the statute make it plain and beyond all doubt that the statute was only intended to apply to lost money or goods, which, as we have seen, is property that the owner has casually or involuntarily parted with, and not property which the surroundings evidence that the owner deposited intentionally in the place where found, for safe-keeping. As the effect of this statute is to innovate the common-law rule in destroying the title of the owner of lost property after a certain period, upon compliance with its provisions, it certainly ought not, by construction or otherwise, to be extended to cases which do not plainly come within its purview, or other than those which upon the facts are properly denominated lost property. Money or goods, therefore, when found, although the owner is unknown, which has been hidden in the earth by him for safe-keeping, is not property of which he has involuntarily parted with the possession, or lost property, to which the statute applies; and in such case, if the

finder undertakes to treat or deal with it as lost property, his acts thereby will not impair the title of the true owner or defeat his right to recover it. But did the act of the defendant in thus treating the money constitute conversion?

It must be admitted that prior to the distribution of the money according to the statute, all the acts of the defendant, by advertisement and otherwise, were done, not in derogation of the rights of the owner, but to ascertain who was such owner, and for the purpose of satisfactory proof of delivering his property to him. As these means failed to ascertain to whom the money belonged, and there being no clew by any marks to its ownership, upon the assumption that the statute governed in the premises, and that the finders would be liable to suit unless distributed according to its provisions, the defendant for them delivered one half to the county and the other half to the finders. In doing this, he asserted no right or title of himself or them to the money, nor any as against the owner or his representatives, who were unknown; but he acted in good faith, upon the mistaken assumption that the law required him or those for whom he acted to do what was done. The defendant did not assume the right to dispose of the property, nor to assert any dominion over it by virtue of any claim of title of his own or the finders, and consequently there was no conversion, nor any prejudice to the rights of the plaintiff by the instruction complained of.

The judgment must be affirmed.

LOST PROPERTY, finding of in shop or store, etc.: See *McAvoy v. Medina*, 11 Allen, 548; 87 Am. Dec. 733, and note 735; *Kincaid v. Eaton*, 98 Mass. 139; 93 Am. Dec. 142.

RIGHT OF FINDER OF LOST PROPERTY: *Dwyce v. Jones*, 11 R. I. 588; 23 Am. Rep. 528, and note 531; *Livermore v. White*, 74 Me. 452; 43 Am. Rep. 600; *Tancil v. Seaton*, 28 Gratt. 601; 26 Am. Rep. 380; *Hamaker v. Blanchard*, 90 Pa. St. 377; 35 Am. Rep. 654; *Benson v. Sullivan*, 62 Ind. 281; 30 Am. Rep. 172.

BRENNER v. ALEXANDER.

[16 OREGON, 849.]

EXECUTOR AND ADMINISTRATOR. — AT COMMON LAW, GENERAL JUDGMENT AGAINST EXECUTOR, who did not plead *plene administravit* or *præter*, is conclusive evidence of assets in a second action of debt suggesting a *devastavit*, the only qualification being that a matter arising subsequent to the former action, showing a destruction of the assets, or removal of them from the hand of the executor without fault, may be set up.

PARTY CAN COME INTO COURT OF EQUITY FOR RELIEF after judgment at law only when he has been deprived of a legal right by fraud, accident, or mistake, unmixed with negligence or fault on his part. And it is indispensable in founding a right to such relief that an executor or administrator exhibit a case free from negligence or misconduct on his part.

EXECUTOR OR ADMINISTRATOR, WHO, BELIEVING THAT HE HAS ASSETS SUFFICIENT for the payment of all debts, suffers judgment to be entered against him, will be relieved in equity if the assets become insufficient through an unexpected depreciation of their value, for the reason that the defense arises subsequently to the judgment, and without fault on his part; but if he confesses judgment against himself for a debt of his testator or intestate, upon a miscalculation of assets in his hands, and it appears afterwards that the assets are insufficient to satisfy it, he will not be relieved in equity against the judgment.

Hewitt and Bryant, and W. R. Bilyeu, for the respondent.

J. K. Weatherford, for the appellant.

LORD, C. J. This is a suit in equity to enjoin the defendant from issuing an execution upon a judgment recovered by him against the plaintiff.

The facts are briefly these: The plaintiff was the administrator of the estate of Henry Isley, deceased, and while such, the defendant presented a claim against said estate for the sum of \$846.45, which was disallowed; that there came into his hands from all sources the sum of \$1,456.98, and the same was the total assets of said estate; that there was presented, and by him examined and allowed, claims against the said estate amounting in the aggregate to the sum of \$876.72, and that all of said claims have been paid in full of said assets; that the defendant brought an action against the plaintiff, as administrator aforesaid, to recover the amount of said claim disallowed, and in his complaint, among other things, alleged that the plaintiff had in his hands assets applicable to the payment of said claim, and sufficient to pay the same, but that he refused to apply the same thereon; that at the time the plaintiff filed his answer in said action as such administrator, he had in his hands money over and above the pay-

ment of all claims against said estate, about the sum of \$166.26; that belonging to said estate was a note appraised at \$127.38, and real estate appraised at \$700, making a total, according to appraised value, of \$993.64, which the plaintiff then believed was reasonably worth that sum, and that he would realize that amount for it, and that the same would be sufficient to pay the defendant's claim in full; that at the time this plaintiff filed his answer to said complaint, his best knowledge and belief was, that said allegation was true, and that he could not truthfully deny the same, and through mistake as to the true valuation of said property then in his hands, and relying upon the appraised valuation thereof, did not deny said allegation; that judgment was recovered against him on account of said claim against said estate for the sum of \$652.62, and costs, taxed at \$154.84, which said judgment was rendered against this plaintiff personally, and not as such administrator, and the same was docketed; that plaintiff has paid said costs and \$424 on the judgment, and that there now remains on such judgment the sum of \$280 unpaid; that by order of the county court, this plaintiff had sold said real estate as by law required, to the highest bidder, for the sum of \$424, and that the same was approved and confirmed, and a deed executed therefor; that the necessary expenses of administration amounted to the sum of \$200, no part of which has been paid; that the defendant now threatens to cause a writ of execution to be issued on said judgment against the real and personal property of the plaintiff, and will, unless restrained, levy upon the same, etc.; wherefore he asks a decree perpetually enjoining the defendant from enforcing the same, etc.

The defendant appeared and demurred to the complaint, on the grounds that the court was without jurisdiction, and that the complaint did not state facts sufficient to constitute a cause of suit. The court overruled the demurrer, and judgment was rendered for the plaintiff, from which this appeal is brought. Section 1135, Oregon Code, provides that the effect of a judgment or decree against an executor or administrator on account of a claim against the estate of his testator is only to establish the claim, as if it had been allowed by him, so as to require it to be satisfied in the course of administration, unless it appears that the complaint alleged assets in his hands applicable to the satisfaction of such claim, and that such allegation was admitted, or found to be true, in which

case the judgment or decree may be enforced against such executor or administrator.

The contention of the plaintiff admits the regularity and validity of the judgment obtained against him, and that by his admission of assets as alleged, his personal liability thereon; but he seeks to avoid the effect of such judgment, and to restrain its enforcement, on the ground that he was mistaken, or miscalculated as to the value or sufficiency of such assets to liquidate such claim. Nor is it disputed, if the plaintiff had chosen to deny the allegations intended to fix his personal liability, in the event the claim was established against the estate, unless upon the proof submitted the jury found otherwise, but that he would have only been required by the judgment to satisfy it in the course of administration. Satisfied, however, in his own mind that he would realize a sufficient sum out of the assets in his hands to liquidate the claim, the facts indicate that he preferred to rely upon his own judgment, and incur the risk of individual miscalculation, than to put in issue such allegation, and thereby compel the proof of the same. His admission, therefore, obviated any evidence to that effect, and operated the same as if such allegation had been found to be true, thus authorizing the court to render the judgment fixing his personal liability thereunder. A like principle prevailed at common law. A general judgment against an executor who did not plead *plene administravit* or *præter* is conclusive evidence of assets in a second action of defendant suggesting a *devastavit*, the only qualification being that a matter arising subsequent to the former action, showing a destruction of the assets, or removal of them from the hands of the executors without his fault, may be set up: *Tremmier v. Thompson*, 19 S. C. 252. "This proceeds," said the court in that case, "on the ground that the action being against the executor for a debt of the testator has embraced in it two distinct allegations, both of which are necessary to his recovery: first, that the testator owed the debt; and second, that the executor had assets to pay it, whether this latter is or is not expressly alleged in the complaint. The executor has the right to resist both allegations. He may plead *plene administravit*; indeed, he must do so, at the peril of having it concluded against him by default or confession that he has assets. This conclusion rests upon the doctrine of that kind of estoppel known as *res adjudicata*, that a party having the opportunity in an action to make a

defense, and does not do so, is precluded from doing so afterwards." As the plaintiff in this suit was not precluded from making his defense in the action at law, but by his admission authorized the judgment rendered, he cannot now invoke the aid of equity to set it aside, unless he has been deprived of some legal right by fraud, accident, or mistake. "A party," said the chancellor in *Glenn v. Maguire*, 3 Tenn. Ch. 696, "can come into this court for relief after a judgment at law only when he has been deprived of a legal right by fraud, accident, or mistake, unmixed with negligence or fault on his part": *Kearney v. Smith*, 3 Yerg. 127; 24 Am. Dec. 550; *Thurmond v. Durham*, 3 Yerg. 98. This court has no power to supervise the proceedings of a court of law, nor to correct its irregularities: *Thompson v. Meek*, 3 Sneed, 271; *Bissell v. Bozman*, 2 Dev. Eq. 160. While, therefore, courts of equity to prevent injustice may interfere and afford relief, it is indispensable in founding a right to such relief that the executor or administrator exhibit a case free from negligence or misconduct on his part.

It sometimes happens that the assets in his hands are destroyed or depreciated by circumstances over which he has no control, or that a deficiency arises by the payment of claims in full, and subsequently other claims, unknown at the time, turn up, and require to be paid, or there occurs some mistake of fact, originating in ignorance or forgetfulness, or the belief in the existence of a thing which does not exist, material to the transaction; and in all such cases, if he has acted in entire good faith, and his conduct is free from negligence, equity will interpose and afford relief from the inequitable loss or injury which otherwise would befall him: *Story's Eq. Jur.*, secs. 90, 140; *Freeman on Judgments*, sec. 505; *High on Injunctions*, secs. 144, 165, 179, 191. So that an administrator who, believing that he has assets sufficient for the payment of all debts, suffers judgment to be entered against him, will be relieved in equity, if the assets become insufficient through an unexpected depreciation of their value. The reason is, that the defense arises subsequently to the judgment, and without any fault of the administrator. So, too, if the act done or judgment suffered be made under a mistake or in ignorance of a material fact, and without fault on his part, it is relievable in equity. But if an executor confesses judgment against himself for a debt of his testator, upon a miscalculation of the amount of assets in his hands, and it appears afterwards that the assets

are insufficient to satisfy it, he will not be relieved in equity against the judgment: *Freelands v. Royall*, 2 Hen. & M. 575. In that case, Roane, J., said: "Unless we say that it is not competent for an executor to admit assets and confess an unqualified judgment, we cannot interfere in the case." Fleming, J., said: "This appears to be a hard case, but it seems to have arisen from their own miscalculation as to the sufficiency of the assets in their hands to discharge the debt, and not from a misconception on the effect of their waiving their plea of fully administered, and confessing an unconditional judgment."

The case in hand is much stronger on its facts. The defendant had presented his claim to the plaintiff for allowance, and he had rejected it. There was no alternative left the defendant but to bring his action to establish the validity of his claim, and secure his right to its payment in the due course of administration, and in this connection, the law gave him the right to allege and prove in that action, and the plaintiff to admit or deny, and compel proof, that the plaintiff, as such administrator, had assets in his hands applicable to the payment of, and sufficient to satisfy, such claim. Cognizant of the legal consequences of his act, he admitted the allegation, and rendered proof of it unnecessary, and judgment was rendered against him for the amount of such claim as the statute directs.

There is no pretense that the property depreciated in value in consequence of some unexpected circumstance, or that the plaintiff was ignorant of any material fact in respect to such assets, only that he miscalculated or blundered in his judgment of their value, as measured by the sale subsequently made, and that he ought, therefore, to be relieved from the consequences of his own solemn admission, made of record, and which deprived the defendant of the right to prove the truth of his allegation. There was no loss of property or depreciation from any cause of its value; it was the same at the time of the sale as it had been when the estimate of its value was gauged by the plaintiff, and admitted to be sufficient to liquidate the defendant's claim. Nor was there any fact which exists now, but of which he was ignorant then, that influenced his calculation of value, and induced his default. He acted from the suggestions of his own mind, and took upon himself the choice of his own plea, and necessarily the legal consequence resulting therefrom. It may have been injudicious and ill-advised, but courts of equity cannot relieve par-

ties from the consequences of such acts. It must be said, also, that other claims have been paid in full, and the defendant, relying upon the judgment obtained, has not looked to the estate for its payment, and now, long after the rendition of such judgment, the plaintiff says he miscalculated the assets, and acted injudiciously in making the admission of record, asks that he be relieved of its consequences. We do not think we have the power in equity, on the case made, to do it.

The judgment must be reversed, and the bill dismissed.

JUDGMENT AGAINST ADMINISTRATOR, sufficiency of as to form: *Guice v. Sellers*, 43 Miss. 52; 5 Am. Rep. 476. Judgment against is not binding on succeeding administrator *de bonis non*: *Graves v. Flowers*, 51 Ala. 402; 23 Am. Rep. 555.

JUDGMENT, EQUITABLE RELIEF AGAINST, and when refused or granted: *Gregory v. Ford*, 14 Cal. 138; 73 Am. Dec. 639; *McIndoe v. Hazelton*, 19 Wis. 567; 88 Am. Dec. 701; *Gold v. Bailey*, 44 Ill. 491; 92 Am. Dec. 190; *Hibbard v. Eastman*, 47 N. H. 507; 93 Am. Dec. 467; *Litchfield's Appeal*, 28 Conn. 127; 73 Am. Dec. 662. A court of equity will correct a decree entered by consent, when the consent was given by mistake, though the mistake was made by only one of the parties consenting: *Vincent v. Matthews*, 15 R. I. 509; but mistakes of law in decrees will not be so corrected: *Knoz v. Moser*, 72 Iowa, 154; *Hicks v. Coody*, 49 Ark. 425; *Shriver v. Garrison*, 30 W. Va. 457.

BUNNEMAN v. WAGNER.

[16 OREGON, 423.]

ATTACHMENT. — UPON GIVING THE STATUTORY BOND TO RELEASE PROPERTY FROM ATTACHMENT, the attachment is dissolved, and the action proceeds to judgment *in personam*.

ATTACHMENT. — DEATH OF A DEFENDANT AFTER THE WRIT HAS BEEN LEVIED, and a statutory bond given for the release of the property, does not discharge the sureties on such bond from liability.

WHETHER THE INSTRUMENT GIVEN TO PROCURE THE RELEASE OF AN ATTACHMENT IS A BOND OR AN UNDERTAKING IS IMMATERIAL. —An action brought upon the former instrument is governed by the same principles as if brought upon the latter.

IF CREDITOR VOLUNTARILY CONSENTS TO DISSOLVE ATTACHMENT levied upon the goods of his debtor, and relinquishes his lien at the request of any one, the promise of such person to pay the debt thus secured is made upon a valid consideration. The surrender of the lien being a detriment to the creditor is a sufficient consideration for the promise, but to enforce such promise or engagement, it is indispensable that it be in writing.

UNDERTAKING IN WRITING, WHEREBY ONE PROMISES AND AGREES to pay the amount of any judgment which the plaintiff might recover against the defendant in an action, is founded upon a valid legal consideration which the defendant receives by the surrender of the property attached in the action, and such undertaking is good as a common-law obligation.

BONDS INTENDED TO BE GIVEN IN COMPLIANCE WITH STATUTES, although not so given, if entered into voluntarily, and founded upon a valid consideration, and not in violation of public policy or contravening any statute, will be enforced by common-law remedies.

BOND OR UNDERTAKING GIVEN TO OBTAIN RELEASE of property seized upon attachment is not rendered invalid by irregularities in making such attachment. The undertaking having served its purpose to secure the release of the property attached, liability thereon will not be defeated by irregularities in making the attachment,

IT IS NOT ESSENTIAL THAT COMPLAINT SET OUT all the facts which authorize the issuing of an attachment.

Noland and Dorris, for the respondents.

Fulton Brothers, for the appellant.

LORD, C. J. This is an action on an undertaking. The facts are, that the plaintiffs brought an action against the firm of Dipascuale and Sanginetti for goods sold and delivered to them, and levied an attachment on the property of the defendant Dipascuale. Subsequently an undertaking was given by the defendant, Max Wagner, as surety, and the plaintiffs released the property and turned it over to the said Dipascuale. Before the action came to trial, Dipascuale died, and Louis Nelson, a creditor, was appointed administrator of the estate, who was substituted in the action for the defendant Dipascuale, and an amended complaint was filed, and in due time judgment by default was taken in such action against Nelson, as such administrator, and Sanginetti. This judgment not having been paid, the plaintiffs brought this action on the undertaking given as aforesaid. A demurrer was filed, which, being overruled, the defendant answered by a specific denial of the facts alleged, and issue being thus joined, the trial was proceeded with before the court by consent, and resulted in a judgment for the plaintiffs.

There are several assignments of error, and among the first to be noted is, whether the death of the defendant Dipascuale dissolved the attachment and exonerated the defendant Wagner of his liability as surety upon the undertaking. This objection is founded upon the assumption that when an undertaking is given, it takes the place of the property released, but does not discharge the attachment, and that when the defendant Dipascuale died thereafter, its effect was to dissolve such attachment, and consequently, to relieve the defendant Wagner of his liability as surety on such undertaking. But the law is otherwise. When the undertaking was given and the

property was released, the bond did stand as security for the property, or took its place, but its effect was to dissolve the attachment. "By giving the statutory bond," Mr. Wade says, "the attachment is dissolved, and the action proceeds to judgment as an action *in personam*." And again: "When a bond is given to pay whatever judgment may be rendered, and it is approved and the property released, the attachment is dissolved, and it is no longer a proceeding *in rem*, and no plea in abatement traversing the ground of the attachment can be entertained": Wade on Attachment, secs. 183, 186. When, therefore, the undertaking was given, and by reason thereof the plaintiffs released and surrendered the property to the defendant Dipascuale, the attachment was dissolved, and the undertaking took the place of such property, and the action thereafter ceased to be *in rem*.

There was, in fact, no attachment in existence to be dissolved at the death of the defendant Dipascuale. Nor is it true, if there was a subsisting attachment, that the death of the defendant abates or dissolves it. In *Mitchell v. Schoonover*, decided at the present term of this court, it was held that the death of a defendant after the levy of an attachment does not vacate or dissolve it. So that in any view the objection is untenable. Another objection urged is, that the undertaking is not such as is required by statute, and that the court erred in holding it sufficient as a common-law obligation, on the ground that a bond is a writing under seal, and that an undertaking being only a promise to pay the debt of another, and not under seal, no consideration can be presumed; but the same must be expressed in the writing. But in the case at bar there is a good and valid consideration expressed in the undertaking, and the matter of the seal is of little significance.

A bond or undertaking, as either may be prescribed by statute, to be given to secure the release of property attached, are designed to serve the same purpose and to stand upon the same consideration, and when an action is brought upon either, are governed by like principles. If a creditor voluntarily consents to dissolve an attachment levied upon the goods of his debtor, and relinquishes his lien at the request of any one, the promise of such person to pay the debt thus secured is made upon a valid consideration. The surrender of the lien, being a detriment to the creditor, is a sufficient consideration for the promise; but to enforce such promise or

engagement, it is indispensable that it be in writing. When the defendant by his undertaking in writing promised and agreed to pay the amount of any judgment which the plaintiffs might recover against the defendant in that action, such undertaking was founded upon a valid legal consideration which the defendant Dipascuale received by the return to him of the property attached, and was good as a common-law obligation.

In *Central Mills Co. v. Stewart*, 133 Mass. 462, where the bond given was not such as the statute required, but being given and the property released, the court said: "But the creditor may voluntarily consent to dissolve an attachment by which he has sought to secure his debt, and if he does so at the request of any one, a promise by such person to pay the debt sought to be secured, either before or after judgment, is made upon a valid legal consideration. The bond by which the defendant agreed to pay the amount of any judgment which the plaintiffs might recover, etc., was therefore made upon sufficient consideration, which the defendant received by the surrender of the property attached, and was good at common law." Now, in the case at bar, the undertaking was duly executed by the defendant and accepted by the plaintiffs, and by their order the attachment was thereupon dissolved, and the property surrendered to its owner. The object of the undertaking, and its purport, is too plain to admit of controversy.

There is no question but what it is founded upon a valid legal consideration, is violative of no statute, and contains no illegal provisions. Why, then, is it not a good common-law obligation? The principle is familiar, that bonds intended to be taken in compliance with statutes, although not done so, if entered into voluntarily and founded upon a valid consideration, and do not violate public policy or contravene any statute, will be enforced by common-law remedies: *Pulmer v. Vance*, 13 Cal. 553; *Munter v. Reese*, 61 Ala. 395; *Wade on Attachment*, sec. 187; *Kelly v. McCormick*, 28 N. Y. 322, 323. A bond or undertaking given to obtain the release of property seized upon attachment is not rendered invalid by irregularity in making such attachment. By means of it, the property was released and surrendered, and the plaintiffs consented to dissolve the attachment, and the defendant in this action cannot defeat his liability because of some irregularity in such proceeding. The undertaking served its purpose to

secure the release of the property attached, and the defendant is estopped now from setting up such irregularities: *Carlton v. Dixon*, 12 Or. 148; *Coleman v. Bean*, 14 Abb. Pr. 38. This result necessarily obviates the objections in respect to the attachment proceedings, and dispenses with the necessity of any further examination of them. Nor is it essential that the complaint set out the facts which authorize the issuing of the attachment, and consequently there was no error in overruling the demurrer.

In regard to the objections raised as to the death of Dipascuale and his true name, and as to the appointment of the administrator, it is sufficient to say that we have examined the record and the argument in support of the objections, and are not satisfied that any prejudicial error is shown. It is to be borne in mind that in cases of this character, technical defenses are not favored, and the case does not stand as to objections as it would between the parties to the original action.

It is objected also that the judgment is in excess of the amount named in the bond, and that such excess is error; but it is not in excess of such sum with interest from the breach, even though it be conceded that the liability under the undertaking is to pay "the amount of any judgment which may be recovered against the defendant in this action."

Upon the whole, we think the judgment must be affirmed.

RELEASE FROM ATTACHMENT, SUFFICIENCY OF BOND: *Cole v. Parker*, 7 Iowa, 167; 71 Am. Dec. 439, and note 443.

STATUTORY BONDS, defects which do not invalidate: See *Pratt v. Wright*, 13 Gratt. 175; 67 Am. Dec. 767; *People v. Hartley*, 21 Cal. 585; 82 Am. Dec. 758, and note 761.

WHAT IRREGULARITIES AVOID ATTACHMENT: *Fridenberg v. Pierson*, 18 Cal. 152; 79 Am. Dec. 162. Where a writ of attachment was returned three days before the return day, without personal service on defendant, who was proceeded against by publication, and a judgment rendered against him, the return was premature, and the judgment was reversed: *Drew v. Claypool*, 61 Mich. 233; and an affidavit for an attachment is rendered fatally defective by an alternative statement therein to the effect that the payment of the contract on which the action is brought has not been secured by any mortgage upon real or personal property, or, if originally so secured, that such security has become valueless without any act of plaintiff: *Winters v. Pearson*, 75 Cal. 553; but an affidavit for attachment made upon belief only, though defective, is not a nullity, and by failing to object to its sufficiency in the court below, the defect is waived, and cannot be made available on appeal: *Landfair v. Lowman*, 50 Ark. 446; nor does an affidavit for attachment against a firm, which fails to state the individual names of the members, but does state the firm

name, render the attachment void: *De Leon v. Heller & Co.*, 77 Ga. 740; an affidavit for an attachment, which states that defendants are non-residents of the state, but does not state that the plaintiff had a just demand against defendants, and the amount due plaintiff, after allowing all just credits and set-offs, is not so fatally defective as to fail to confer jurisdiction, and a judgment thereunder could no more be held a nullity than could a judgment be held void in a collateral proceeding, because founded upon a defective petition: *Burnett v. McCluey*, 92 Mo. 230.

AMENDMENT OF WRITS OF ATTACHMENT, AND OF PAPERS ON WHICH THEY ARE BASED: *Barber v. Swan*, 4 G. Greene, 352; 61 Am. Dec. 124, and note 125-131. The affidavit for attachment sworn to before a notary public, who is the attorney for plaintiff in the action, is only voidable, and may be amended: *Swearingen v. Houser*, 37 Kan. 126; and where an affidavit for attachment contains the essential allegations of a complaint, the failure to file a separate complaint is a mere irregularity, which may be cured by amendment: *Lehman v. Lowman*, 50 Ark. 444. An amendment to a petition for attachment varying the date on which the original petition alleged that the debt was due will not vitiate the attachment: *Donnelly v. Elser*, 69 Tex. 282; and amendments after judgment may be allowed to conform a pleading to other proceedings, but where an amendment by an intervenor in an attachment case sets up new issues, it comes too late after judgment on the original petition and a sale of attached property: *Bicklin v. Kendall*, 72 Iowa, 490. And in Alabama, since the code of 1887, an affidavit for attachment may be amended in matters of substance as well as in matters of form: Code, sec. 2998; *Robinson v. Holt*, 85 Ala. 596; but on a motion to discharge a writ of attachment, because improperly or irregularly issued, the affidavit on which the writ was issued cannot be amended: *Winters v. Pearson*, 72 Cal. 553. Yet where proceedings in attachment are irregular and amendable, but not void, and no objection is made thereto by defendant in the action, third parties cannot attack such proceedings collaterally: *Connelly v. Edgerton*, 22 Neb. 82.

ANDERSON v. BENNETT.

[16 OREGON, 515.]

MASTER AND SERVANT. — GENERAL DOCTRINE THAT MASTER IS NOT LIABLE FOR INJURIES caused by the negligence of a fellow-servant engaged in the same common employment is now regarded as settled law. The reason commonly assigned for this exemption is, that by his contract of employment, the servant assumes the risks incident to it, and that both he and his master had them in contemplation in fixing the compensation.

MASTER AND SERVANT. — LATER CURRENT OF JUDICIAL DECISION, AS WELL AS LEGISLATIVE ACTION, indicates a marked departure from the general rule, that all servants employed by the same master, and working under the same control and in a common employment, are fellow-servants, and a disposition is manifested to so limit and restrict the rule as shall make the master answerable for his just share of responsibility to his servant for injuries sustained in his employment.

MARKED CHANGE IS TAKING PLACE FROM OLD RULE OF LAW as to servants clothed with partial authority only, such as a foreman or upper servant, upon the principle that when a master delegates any duty which he owes to his servants, he is liable for its proper performance.

CONCLUSION TO BE DEDUCED FROM LATER AUTHORITIES IS, THAT MASTER IS CHARGEABLE for any act of negligence in so far as the servant is charged with the performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and instrumentalities, the providing of a reasonably safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils, which may be guarded against by proper diligence, etc.; and to the extent of the discharge of these duties which the master owes to his servants by the middle-man or vice-principal, the latter stands in the place of the master.

MASTER OWES DUTY TO EVERY SERVANT TO PROVIDE a reasonably safe place at which to work, consistently with the nature of the undertaking, and although he is not an insurer, he is bound on the same principle by the law to exercise due and proper care in this regard as he is in hiring competent servants, or in supplying reasonably safe machinery or other appliances for the use of his servants. This is regarded as a personal or absolute obligation, and if it is intrusted to a servant, such servant is the representative of the master, and any negligence on his part is the negligence of the master.

MASTER'S OBLIGATION NOT TO EXPOSE SERVANT TO PERILS which by proper diligence may be guarded against becomes more important, and the degree of diligence and care to be exercised in its performance the greater, in proportion to the dangers which may be encountered.

WHERE MASTER WAS NOT PERSONALLY PRESENT AND DID NOT PROMULGATE or establish any suitable or needful rules and regulations for the safe and proper conduct of the work, and the direct management or execution of the work during his term was placed in charge of a superintendent or foreman, there necessarily devolved upon him the duties in this particular which the master owed to his servants. As a consequence, it became the duty of such foreman to provide for the safety of the servants under his control and subject to his commands, by the exercise of such care in the management and conduct of the undertaking intrusted to him as would render reasonably safe the place at which the employees must apply the machinery and do their work; failing in which, his negligence should be deemed the negligence of the master.

George W. Yocum and F. Clarno, for the respondent.

H. Y. Thompson and George H. Williams, for the appellant.

LORD, J. This is an action to recover damages for personal injuries caused by the alleged negligence of the defendant's two servants and agents. The complaint in effect is, that the defendant was engaged in constructing the tunnel on the line of the Northern Pacific Railroad Company, and that the plaintiff was engaged in his service for hire as a common laborer during the time therein mentioned; that Thomas Cosgrove was the foreman, manager, and superintendent of said

work, and that plaintiff was directly under his control and authority, and that by reason of his negligence he was greatly injured, and his eyesight destroyed.

The substance of the evidence is, that the defendant was a contractor for the construction of a tunnel for the Northern Pacific Railroad Company, and that S. J. Bennett was his chief superintendent, and M. B. Turner was his assistant, at the west end of the tunnel where the plaintiff was engaged at work, and that Cosgrove was the foreman of the gang or shift of men to which the plaintiff belonged; that in the prosecution of this work there were two shifts or gangs of men working alternately by day and night; that, in performing this work, they would clear up so much of the broken rock and *débris* as would make a clean place for them to operate their drills, which bored holes horizontally and perpendicularly in the benches of the tunnel, then charge them with giant powder, and explode it, when that gang or shift would retire, to be succeeded by the other, who would go through in their turn a like routine of labor; that the materials and appliances for doing the work was furnished by Bennett, the superintendent; that Cosgrove was a man of skill and experience in the business of tunneling; and that, in the management of the work of blasting during his term, he acted upon his own judgment, directed and controlled the use of the explosives as well as the use and location of the machinery and drills, commanded the movements of the men under his control, and ordered them when and where and what to do, and how to do it; that he had hired and discharged men under his control, although his authority to do so was denied and contradicted, but not the fact that he had done so; that on the day of the accident the plaintiff was ordered by Cosgrove to drill a perpendicular hole in a certain rock in the tunnel, and that Cosgrove placed the drill on the spot, and ordered and directed the plaintiff to drill the hole, which he was engaged in doing when the explosion occurred that caused the injury; that the injury was occasioned by his boring into a missed or unexploded hole, which was not discoverable by reason of the neglect of the foreman to remove the *débris* and broken rock.

In respect to this point one witness testified "that until a good deal of work in cleaning up had been done, that it was impossible for any one to tell whether there was any missed or unexploded holes; that they did not work long in cleaning up before they started drilling; that the missed hole which

exploded and done the injury to the plaintiff was covered up with loose rock, and no one could see whether there were any missed holes or not." And again: "There was no chance to examine for missed holes until the rock was cleaned off; nobody could tell there was any missed holes because there was so much rock and *débris*." And when the inquiry was made why it was not cleared off so as to find out whether there were any missed or unexploded holes, the witness answered: "Because we did not have time. The foreman would not give us time, he was pushing us ahead all the time, hurrying us up." This evidence in substance is fully corroborated by others.

It is further testified to "that the first thing we did when we got in was to clean off the benches and get ready for drilling"; that before putting the drills to boring, it was necessary to have a clean place, and as soon as this was done the drilling began. As to the condition of the tunnel, Cosgrove testifies when he went in that "he looked the tunnel over to see if it was safe, — supposed it was safe; that the lower part, you could not tell anything about it, as it was all covered with rock." He further testified that "there was a rule for the men to look after missed holes and to report them to him," and the evidence shows that the plaintiff complied with this regulation. In this particular it may be well to note to what he testifies. "When I was drilling the first hole I discovered an unexploded hole, and called the foreman's attention to it. This hole I discovered was about ten or twelve inches from the hole I was drilling, — maybe a little one side. I asked the foreman if he thought there was any danger for me to work in that place. He told me there was no danger, 'go ahead and work.' When the hole was finished, I called the foreman's attention again, and asked him in what place he wanted me to drill the next hole, and the foreman took hold of the drill with his hand, and set the hole in a perpendicular place and ordered me to drill. This was from four to five feet from the hole I had just drilled. I was drilling a perpendicular hole. When I had drilled only a short time in that place, the explosion happened." And he testifies, "that the reason of the explosion was, that there was a hole that failed to explode underneath a hole that the foreman had ordered me to drill, and as soon as a part of the drill struck the powder it exploded. That explosion destroyed my eyesight."

The evidence also shows that the men were put to work

cleaning away the *débris* in the first instance only for the purpose to get a clean place so as to operate the drills, and that when this was accomplished, the drills were set agoing; that, with the exception of the rule already referred to, there was no other rule or regulation or instructions devised to protect or provide for the safety of the men in the course of their employment, or requiring the broken rock and loose dirt to be cleaned off so as to discover and expose the unexploded holes before the process of drilling began.

Some idea of the force of the explosion, and the danger arising from unexploded holes, unless proper precautions are taken to discover them, is shown by the evidence, when it resulted in the killing of four men outright, and seriously wounded and maimed some six or seven others of the gang. Upon substantially this state of facts the court, after giving the usual preliminary instructions to guide the jury in weighing the evidence, etc., charged them that "it was a settled rule of law that a master was not liable to his servant for injuries caused by the negligence of a fellow-servant, and if they found Cosgrove was such, their verdict must be for the defendant; that the term 'fellow-servant,' as a general rule, includes all who serve the same master, work under the same control, and derive compensation and authority from the same source, and are engaged in the same general employment, etc.; that where a master submits the substantial control of the business, or a particular department thereof, to another, giving to such party the power to select his associates, and to discharge them, and full authority to command the laborers over whom he is placed, and direct when and where and how they shall work, the party so invested with authority, although himself a servant, is not a fellow-servant of the laborers thus placed under his control, but that such party stands in the relation of vice-principal, and the master is answerable for his negligence." Then, directing his instructions more particularly to the facts of the case in hand, said: "If the jury find from the evidence in this case that Cosgrove was at the time of the explosion described in the complaint charged and intrusted by the defendant with the control and management of the blasting, and the using of high explosives in the Cascades tunnel, and had authority to choose and discharge the men employed in the work, and to command and direct when, where, and how the men should work, and that in pursuance of such charge and trust Cosgrove was exercising authority over the

plaintiff as one of the employees of the defendant, so that he could and did rightfully order and direct plaintiff when, how, and where he should work, and with what tools and appliances he should work, then Cosgrove is not to be deemed a fellow-servant of the plaintiff; but in respect to this business, he should be deemed as in place of the master, and Cosgrove's negligence, if he was negligent, should be deemed the negligence of the defendant. If, on the other hand, the jury find from the evidence that Cosgrove's position and authority at the time of the explosion were those simply of a foreman of a gang or shift of men, having only authority in the direction of the work of such gang or shift, then he is a fellow-servant with the plaintiff, and the defendant is not liable." It is sufficient to say that the trial resulted in a verdict and judgment for the plaintiff, from which the defendant has brought this appeal.

The contention of counsel in this case may be thus summarized: Unless Cosgrove was the fellow-servant of the other servants under his direction and control, or the instruction last referred to incorrectly defines a vice-principal or representative of the master as applicable to the facts, there is no error in the record, and we must affirm this judgment. The general doctrine that a master is not liable for the injuries caused by the negligence of a fellow-servant engaged in the same common employment is now regarded as part of the common law of this land. The reason commonly assigned for this exemption is, that by his contract of employment, the servant assumes the risks incident to it, and that both he and his master had them in contemplation in fixing the compensation. Hence it is said: "He cannot in reason complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid": *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 383. But what are the natural and ordinary risks incident to his employment, and which are supposed to have been adjusted in the stipulated compensation, and who within the principle of the rule are to be deemed fellow-servants engaged in a common employment, are questions often difficult to determine, and in respect to which the adjudged cases are so conflicting that it is impossible to reconcile them. Each case in a great measure seems to be determined by the peculiar circumstances which surround it.

Although *Murray v. S. C. R. R. Co.*, 1 McMull. 385, 36 Am. Dec. 268, was decided prior to *Farwell v. Boston & W. R. R.*

Co., 4 Met. 49, 38 Am. Dec. 339, yet the latter has been usually regarded as the leading case in which the doctrine of fellow-servants was first clearly enunciated, and its principles ingrafted into our law. The rule as there stated by the eminent judge who delivered the opinion is to the effect that all servants of the same master whose labors tend to the accomplishment of the same general purpose, and engaged in a common employment, are fellow-servants, irrespective of their relative grade or rank. The rule as thus declared was generally accepted by the courts of the country as a correct exposition of the law, and it has been approved and adopted by the highest court in England. Within the principle of that rule, all servants, no matter what position they occupied toward each other, or how different and separated the departments of duty in which they were employed, whether operating a mine or factory or railway, were deemed to be fellow-servants.

In *Albro v. Agawam Canal*, 6 Cush. 75, the court held that a superintendent to whom the master had intrusted the entire charge of a factory, with the authority to hire and discharge the operatives, was a fellow-servant with one of such operatives. This view has been stoutly adhered to in Massachusetts ever since: *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268; 37 Am. Rep. 343; and perhaps is still maintained in Pennsylvania: *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 438. It seems to ignore the generally accepted idea of vice-principalship as it prevails in some of the other states, and treats all servants under the same control, who serve the same master, as fellow-servants, notwithstanding one may stand in the master's place in relation to the other. And in Great Britain, until abrogated by the employer's liability act, the same principle was the settled law as declared by the highest judicial tribunal in that kingdom: *Toilser v. Merry*, 1 H. L. Cas. 326. This is specifically stated by Lord Blackburn in his comments upon that case, in which he said: "But the decision of the house of lords is distinct, at least so far as this, that the fact that the servant held the position of vice-principal does not affect the non-liability of the master for his negligence as regards a fellow-servant: *Howell v. Steel Co.*, L. R. 10 Q. B. 62. But in the progress of society since the decision in *Farwell v. Boston & W. R. R. Co.*, *supra*, such has been the increase in the number and magnitude of the business operations of the country, the great army of servants required to be

employed to perform their work, and the necessity of placing over them, and in charge of these vast operations, other servants to direct and control their labor, that there has been wrought in the judicial mind the conviction that the general application of that rule in such cases has often worked manifest injustice and hardship. So that the later current of judicial decision, and it may be added of legislative action, indicates a marked departure from that rule, and a disposition to so limit and restrict it as shall make the master answerable for his just share of responsibility to his servant for injuries sustained in his employment. And although it may be said that the weight of adjudged cases is, that the relative grade or rank of the servant does not alter the relation of fellow-servants, yet this principle has not always commanded universal recognition, but it has been criticised and denied, and a contrary view asserted by the courts of several of the states, and at least materially limited if not recognized and adopted by the supreme court of the United States.

In *Cleveland etc. R. R. Co. v. Keary*, 3 Ohio St. 201, the court say: "No service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over another." In *Darrigan v. New York & N. E. R. R. Co.*, 52 Conn. 285, 52 Am. Rep. 590, Carpenter, J., said: "To make no discrimination, but in all cases to place those invested with authority to direct and control on the same footing with those whose duty it is merely to perform, as directed, without discretion and without responsibility, seems to us unwise and impolitic": *Louisville & N. R. R. Co. v. Bowler*, 9 Heisk. 866; *Cowles v. Danville R. R. Co.*, 84 N. C. 309; 37 Am. Rep. 620; *Moon v. Richmond & A. R. R. Co.*, 78 Va. 745; 49 Am. Rep. 401; *Chicago & A. R. R. Co. v. May*, 108 Ill. 288; *Chicago, St. P., M. etc. R. R. Co. v. Lundstrom*, 16 Neb. 261; 49 Am. Rep. 718; *Louisville & N. R. R. Co. v. Collins*, 2 Duvall, 114; 87 Am. Dec. 486; *Criswell v. Railroad Co.*, 30 W. Va. 798; 1 Redfield on Railroads, 529, note, in which the learned author says: "We would be content to treat all subordinates who are under the control of a superior as entitled to hold such superior as representing the master."

In *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 377, the court below had ruled in effect that, in the operation of a train, the relation of superior and inferior was created between the conductor and engineer, and therefore within the reason of the rule they are not fellow-servants, and in affirming this ruling,

Mr. Justice Field said: "There is, in our opinion, a clear distinction to be made in their relation to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of supervision and direction. A conductor having the entire charge or management of a railway train occupies a very different position from the brakeman and porters, and other subordinates employed. He is, in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. . . . The conductor of a railroad train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner." These and other references might be made to show the extent to which the rule has been relaxed and modified in several of the states, as well as the dispute which exists as to the proper limitations. Nor can there be any doubt but that a decided change is taking place from the old rule as to servants clothed with partial authority only, such as a foreman or upper servant, which consider such as fellow-servants with those under their control, and subject to their orders, and for whose negligent acts the master was not liable.

A principle upon which a change in the law is based is, that when the master delegates any duty which he owes to his servants, he is liable for its proper performance. One way of applying it in determining the line of demarkation between the middle-man or mere servant is to ascertain whether the master has conferred on the foreman or superior servant the authority to employ and discharge the servants under his control. By some courts, this seems to be regarded as a decisive test, while others consider it only as an element, although an important one, in determining that question. Another way is by considering the master liable, if the negligent servant is in charge of or vested with the discretion to control and manage a branch or department of the master's

business. But this must be understood to mean something more than the mere right to oversee hands or direct their labors, something more than higher wages or general superiority in position, or in skill or intelligence. Another way of testing is by holding that it is a personal or absolute obligation or duty which the master owes the servant to provide proper instrumentalities, etc., for the conduct of his business; and if he intrusts this duty to his servant, instead of discharging it himself, such servant is not a fellow-servant within the meaning of the rule of liability for negligence, and the master is liable for its performance.

In Shearman and Redfield on Negligence, section 102, the law is thus stated: "One to whom an employer commits the entire charge of the business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal could himself, is not a fellow-servant with those employed under him, and the master is answerable to all under-servants for his negligence, either in his personal conduct within the scope of his employment, or in his selection of servants." Mr. Beach thinks the better rule, and the one more consonant with justice and right reason, has been well stated by McIver, J., in *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 263, 44 Am. Rep. 573, in this language: "The test as to whether an employee is the representative of the master is not whether such employee has power to employ and discharge hands, or to purchase or change machinery, for while these are some of the duties of the master, they are not all his duties, and hence an employee who is not intrusted with either of these powers may still be the representative of the master. The true test is, whether the person in question is employed to do any of the duties of the master; if so, he cannot be regarded as a fellow-servant, but is the representative of the master, and any negligence on his part in the performance of the duty thus delegated to him must be regarded as the negligence of the master": Beach on Contributory Negligence, secs. 110, 115. "When the master," says Mr. Wood, "delegates complete control over the business, or over any department thereof, to another, the person standing in his place is not regarded as a fellow-servant, but rather as a vice-principal. In such case, the person to whom such power is delegated stands in the place of and represents the master; and all acts or omissions in respect to the matters in which he acts in the place of the master in performing the

master's duty to the servant are the acts or omissions of the master himself": Wood on Master and Servant, sec. 436. And he further says: "The rule established and supported by the better class of cases is, that whenever the master delegates to another the performance of a duty to his servant which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middle-man whom he has selected as his agent, and to the extent of the discharge of those duties of the middle-man he stands in the place of the master; but as to all other matters he is a mere co-servant": Id., sec. 437, and note 3.

It is thus seen, whatever diversity of opinion exists in the judicial mind as to the proper qualifications or limitations of the rule, the cases agree that the master is under no personal obligation to give his personal superintendence to the execution of the work, but that he may delegate that power, or any of the duties, to a superintendent or foreman. The question which most frequently arises, and often the most difficult of solution, is in respect to a foreman, and the relation upon the facts in which he stands to the other servants. It is no doubt true, as Mr. Thompson says, that a mere foreman of work is generally regarded as a fellow-servant under the rule; but if the master has delegated to him, or to a superintendent, the control and management of the business, or some department thereof, then the rule may be different. And he says: "A true expression of the rule seems to be, that in order to charge the master, the superior servant must so far stand in the place of the master as to be charged with the duties toward the inferior servant, which, under the law, the master owes to such servant": 2 Thompson on Negligence, p. 1028.

A foreman ordinarily works hand to hand with his co-servants, and does not have the entire charge and control of the business, or any division thereof; he does not act upon his own judgment, but is generally subject to the orders and control of a superintendent; his duties do not exceed mere direction of his co-servants, and do not include the power to hire or discharge hands, or the performance of duties which belong to the master himself: *Indiana Car Co. v. Parker*, 100 Ind. 181; *Brick v. Rochester etc. R. R. Co.*, 98 N. Y. 211; *Doughty v. Penobscot Co.*, 76 Me. 143; *Hawthorn v. State*, 57 Ind. 287. Now, the main contention of counsel for the defendant is, that Cosgrove was a fellow-servant with those under his control, and

not a vice-principal, whom, he argues, to create, the master must have committed to him the entire charge of the business, with full powers to select servants and discharge them, purchase materials and appliances, and do all things as fully and freely as he could himself in the management of the business. On the other hand, the contention of counsel for the plaintiff is, that the master had committed to Cosgrove a distinct portion of the work, and devolved upon him the control and management of it, and the method of its execution, with power to direct the men, and enforce obedience to his orders in the prosecution of their work, which involved the performance of some duties that the master owes to the servant, and which, if he intrusts or delegates them to another, he is answerable for the manner in which they are discharged.

Tested by the rule as laid down by some text-writers, and sustained by a number of respectable authorities, Cosgrove was a fellow-servant, and not a representative of the master. He did not have delegated to him the entire charge of the business, or any department thereof, so exclusive in its character that the master deprived himself of all authority or supervision in respect to it. Under that rule, although Cosgrove might be charged with the performance of some duty which the master owes to his servant, yet if he has not delegated to him all the master's powers and duties, surrendered to him the exclusive control and management of the enterprise or business, without **reserving to himself any discretion or authority in the matter**, he would be regarded as a servant in a common employment with those under him, and therefore a fellow-servant. "The true rule is," said Church, C. J., "to hold the master liable for negligence or want of proper care in respect to such duties as he is required to perform and discharge as master and principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the master, and the latter should be deemed present, and consequently liable for the manner in which they are performed": *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 553, 13 Am. Rep. 545.

The same principle was again declared in *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575, in which it was held that an act or duty which the master, as such, is bound to perform for the safety and protection of his employees cannot be delegated so as to relieve him from liability to a servant injured by its omission, or its negligent performance, whether the non-

feasance or misfeasance be that of a superior or inferior officer, agent, or servant, to whom the doing of the act or the performance of the duty has been committed. "In either case, in respect to such act or duty," said the court, "the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury."

The conclusion to be deduced from these and other authorities to which reference might be made is, that the master is chargeable for any act of negligence, in so far as such servant is charged with the performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and appliances, the providing of a reasonable safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils, which may be guarded against by proper diligence, etc.; and to the extent of the discharge of these duties which the master owes to his servants by the middle-man or vice-principal, the latter stands in the place of the master. In this place there is no complaint that the defendant, as master, did not select competent servants, or that he retained incompetent ones, nor failed to supply suitable instruments with which to do the work; but the grievance of which the plaintiff complains is that he, or that his agent Cosgrove, to whom he committed the execution of the work, failed and neglected to take such precautionary measures for the safety of his servants as he owed to them, and was in duty bound to observe, so as to provide for their safety and for them a place, as reasonably safe as was consistent with the nature of the undertaking, in which to labor and attend the drills. It is the duty which the master owes to every servant to provide a reasonably safe place in which to work, and although he is not an insurer, he is bound on the same principle by the law to exercise due and proper care in this regard as he is in hiring competent servants, or in supplying reasonably safe machinery or other instrumentalities for the use of his servants.

This is regarded as a personal or absolute obligation. And if the discharge of this obligation is intrusted to a servant, such servant is the representative of the master, and any negligence on his part is the negligence of the master.

The servant has a right to rely on the master's performance of this duty, and his omission to take due care in this respect, whereby injury results to his servant, will be included among

the risks which he assumes, and for which he is liable; and while he is not an insurer of their safety, he is not at liberty to neglect all care; he must use due and reasonable care, according to the exigencies of the undertaking. The obligation not to expose the servant to perils which by proper diligence may be guarded against becomes more important, and the degree of diligence and care to be exercised in its performance the greater in proportion to the dangers which may be encountered: *Hough v. Railway Co.*, 100 U. S. 214; *Darrigan v. New York & N. E. R'y Co.*, 52 Conn. 306; 52 Am. Rep. 590. The duty, therefore, is affirmative and active to take such or to adopt such precautionary measures as the proper and reasonably safe conduct of the business requires to avoid accident. Now, the evidence shows that the defendant intrusted the work of blasting and using dangerous explosives in charge of Cosgrove, and placed the men under his control, and subject to his orders for the execution of that work. In this respect he exercised supervision over the work, managed and controlled the use of the explosives, directed the place where the machinery and drills should be applied and used, and where and how the men should work.

It appears that after an explosion in the work of blasting the benches and floor of the tunnel would be covered with broken rock and *débris*, and that the work of the shift or gang of men that came on was to clean out the *débris*, drill holes, charge them with giant powder, and explode it, etc.; that if any holes thus charged failed to explode, it was impossible to discover and locate them until such broken rock and *débris* had been removed, and that if the drills with the force applied to them should penetrate any of such unexploded holes, it would cause an untimely explosion, and necessarily occasion great injury to the men, and probably a great loss of life. Under these circumstances, it was plainly a duty and absolutely essential, to avoid exposing the men to unreasonable risks in the course of the work in which they were engaged, that so much of the rock should be cleaned away before the drilling began as would expose any missed or unexploded holes, or as would enable them to be discovered and located, so that the charge might be withdrawn, or other thing done to render them harmless, and the drilling and other work go on with comparative safety, or no other danger than was incident to its precaution. The defendant was not personally present,

nor did he promulgate or establish any suitable or needful rules or regulations for the safe and proper conduct of the work; and as the direct management of the work during his turn was placed in charge of Cosgrove, there necessarily devolves upon him the duties in this particular which the defendant owed to his servants. It was therefore the plain duty of Cosgrove to provide for the safety of the servants under his control and subject to his commands, by the exercise of such care in the management and conduct of the business intrusted to him as would render reasonably safe the place in which the men must apply the machinery and do their work.

There is nothing in the evidence to show that he took any such care, or took any such precautions as the nature of the business and his duty to the servants required. Instead of putting the men at work to clean up the *débris* and broken rock which covered the benches and floors of the tunnel for the purpose, first, of discovering and finding out whether there were any unexploded holes, and uncharging them so that the place in which the men must work with the drills and do other work would be safe from penetrating a magazine in which lay stored and concealed a box of giant powder, he put them to work in cleaning up the *débris* only for the purpose of getting a clean place to operate the drills, and when this was accomplished, the drills were started at once, without regard to missed holes, or the dangers which lie buried under broken rock beneath their feet, but which would have necessarily been exposed by its removal. "Nobody could tell that there were any missed holes because there was so much rock," and "we had no chance to examine for missed holes until the rock was taken off." "He did not give us time to clean up and see if there were any missed holes,"—and so on the evidence runs. Had the foreman exercised only reasonable care and diligence, took a precaution that it would seem the plainest dictate of humanity would require for the safety of the men in the work in which they were engaged, the missed hole must have been exposed, and this dreadful death-dealing explosion avoided. Cosgrove himself testifies that "he supposed it was safe; that there was a good deal of broken rock," etc.; but this has reference to when he entered the tunnel with his shift of hands, and when nothing had been done to clear away the *débris*. There is nothing in the evidence to show that he did anything then or afterwards which would make it—as he

supposed it was—safe. It is the duty of the master not to expose the servant in performing his duties to hazards or perils which may be guarded against by proper diligence: *Hough v. Railway Co.*, 100 U. S. 213. He is bound to observe that degree of care which prudence and that exigency of the situation or the nature of the work may require, to furnish reasonably safe instrumentalities or place in which to work to avoid danger.

"Though we have said," justly remarked Baron Alderson, "that a master is not generally responsible to a servant for an injury occasioned by a fellow-servant, while they are acting in a common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servants to unreasonable risks": *Hutchinson v. York etc. Ry Co.*, 5 Ex. 348. "It was held by this court," said Carpenter, J., in *Wilson v. Willamantic L. Co.*, 50 Conn. 433, 47 Am. Rep. 653, "that a master was bound to provide for his servant a reasonably safe place for his work, and reasonably safe appliances. An application of this principle to a railroad would require it to keep its road-bed, rolling stock, and implements in a good and safe condition, to adopt rules and regulations adapted to its business, so as to guard against accidents. In short, all employees shall be vigilant in the use of means and the adoption of measures to make the servants in their employ reasonably safe. To that extent the master assumes the risk": *Darrigan v. New York etc. R. R. Co.*, *supra*; *Baltimore and Ohio R. R. Co. v. McKenzie*, 81 Va. 73. "Indeed," said Mr. Justice Field, "no duty required for the safety and protection of his servants can be transferred so as to exonerate him from such liability": *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 646.

In *Atchison etc. R. R. Co. v. Moore*, 29 Kan. 633, the court say: "In all cases at common law a master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work." And again, in *Hannibal etc. R. R. Co. v. Fox*, 31 Id. 596, it is said: "One of the exceptions to the general rule at common law, that the master is liable to one employee for the negligence of another employee in the same service, arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to hazards or perils against which he

may be guarded by proper diligence on the part of the master. If it were otherwise, the master would be released from all obligation to make reparation to an employee in a subordinate position, for an injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service, or not." And finally, in *Fraker v. Minneapolis etc. R. R. Co.*, 32 Minn. 54, the court say: "It is the duty of the master to establish and promulgate suitable and needful regulations for the safe and proper conduct of its business. And there are duties which belong to the master as such, and in the performance of which he is bound to exercise such diligence for the protection of his employees, and if they are performed through an agent of whatever grade, he must be deemed to represent the master, and the latter is accordingly responsible for their negligent performance."

This is the language running all through the authorities upon this subject, and from these, and others to which reference might be made, the principle is fully established that it is the duty of the master, or the person who represents him, to use reasonable care and diligence and make reasonable provision for the servant's safety; and if he fails to do this, he is responsible for the injury sustained as the result of his own or the agent's negligence, unless there was contributory negligence. It was, therefore, the duty of the defendant to make such needful rules for the conduct of the work, or take such precaution, as would provide for the safety of the men under the direction and control of Cosgrove, as would not expose them to unreasonable risks or dangers in the performance of their duties. As a consequence, it was the duty of the defendant to protect them from the dangers of unexploded holes while engaged in their employment, as without such protection they would be constantly liable to imminent perils. As we have shown, if the reasonable precaution had been taken to remove the *débris* and broken rock, the unexploded hole which occasioned the injury must have been exposed and discovered, and the disastrous explosion avoided; but the defendant made no provision for these matters.

In the execution of the work and the control of the men, he left everything to Cosgrove, and necessarily the adoption of such measures as would protect them while engaged in their work. He was thus not only the foreman to direct the work of the men under him, but the person above all others to pro-

vide that they should have a reasonably safe place at which to work, with reference to its risks and exigencies, and consequently it became his duty to be vigilant in the use of such means as would guard them from the dangers of unexploded holes. In this view, it is of no importance by what name Cosgrove be called, whether middle-man, superintendent, or foreman. The truth is, as was said by the supreme court of North Carolina, that so variant were the relations between master and servants in different employments, and so close the line of demarkation between co-laborers and middle-men, that each case would have to stand upon its own facts.

We think, therefore, when Cosgrove ordered the plaintiff to set up the machinery, and to drill holes at the place where the injury happened, without having taken some care, or at least taken some precautionary measures, to discover whether there were holes which had failed to explode, and to guard against the dangers of the drills penetrating them, he committed a wrongful and negligent act, and exposed the plaintiff to a serious danger not contemplated by his contract of service. In saying this, we are not unmindful that the defendant is not an insurer; but we are mindful that he is not at liberty to neglect all care, but that he must use due and reasonable care. As a result, we do not think Cosgrove was a fellow-servant, nor that there was error in the instruction.

The judgment must be affirmed.

LIABILITY OF MASTER FOR INJURY CAUSED BY NEGLIGENCE OF FELLOW-SERVANT, AND WHO ARE FELLOW-SERVANTS: See *Theleman v. Moeller*, 73 Iowa, 108; 5 Am. St. Rep. 663, and note 664; *McMaster v. Illinois Central R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 653.

MASTER AND SERVANT. — *Injuries to Servant*. — The general rule is well settled that a master is not liable to one employee for an injury resulting from the negligent acts of a co-employee, but there are exceptions to this rule which are equally well settled: 1. Where the injury is occasioned by exposing employee to risks not within his contract of employment; 2. Where the negligent co-employee, whatever his grade or title, exercises supervision or control over the injured employee, the master must answer for the negligent acts of the former, whereby the latter is injured without fault on his part; 3. Where master undertakes to run dangerous machinery with insufficient help, whereby the employee is injured, the master is liable: *Jone v. O. D. M. Co.*, 82 Va. 140; but the fact that the co-employee had authority to discharge his fellow-servants does not of itself constitute such supervision and control over his co-employees as will make the master liable for his negligence: *Webb v. R. & D. Ry Co.*, 97 N. C. 387.

DUTY OF MASTER TO SUPPLY SAFE MACHINERY AND APPLIANCES FOR USE OF SERVANT: *Wustler v. Duluth Lumber Co.*, 37 Minn. 153; 5 Am. St.

Rep. 832, and note 836. The master is not an insurer against injury, nor is he required to furnish tools or appliances of the best or most approved design, safe beyond any peradventure or contingency; but he engages that he will not expose the employee to danger which is not obvious, or of which the latter has no knowledge or adequate comprehension, and which is not reasonably incident to and within the ordinary risks of the service undertaken: *Electric Light Co. etc. v. Murphy*, 115 Ind. 566.

SERVANT ASSUMES ORDINARY RISKS INCIDENT TO EMPLOYMENT: *Wilson v. Winona etc. R. R. Co.*, 37 Minn. 326; 5 Am. St. Rep. 851, and note 854; *Clapp v. M. & St. L. R. R. Co.*, 36 Minn. 6.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

BOWEN *v.* POPE.

[125 ILLINOIS, 28.]

GARNISHMENT OF PROPERTY NOT IN THE STATE. — One cannot be charged as garnishee in respect to promissory notes or other evidences of indebtedness executed by third parties and belonging to the defendant in the attachment, which at the time of the service of the garnishee process and during the pendency of the suit were in another state.

J. C. Broady, for the appellant.

William McFadden, for the appellees.

MULKEY, J. On the twelfth day of October, 1885, the Simmons Hardware Company, a business corporation of St. Louis, Missouri, sued an attachment out of the circuit court of Adams County, against the estate of Benjamin Bowen, a resident of and doing business in the state of Missouri, to which the sheriff of the county, three days afterwards, made the following return:—

“I have been unable to find property of the within-named defendant, Benjamin Bowen, to satisfy the within attachment, and I have served the within writ upon the within-named garnishees, Thomas Pope, William R. Lockwood, and John W. Heitz, copartners under the name and style of Pope, Lockwood, & Co., by reading the within to said John W. Heitz, on the twelfth day of October, A. D. 1885, and giving to said Heitz one dollar and ten cents; and by reading the within writ to within-named Thomas Pope, on the thirteenth day of October, 1885; and by reading the within writ to the within-

named William R. Lockwood, on the fourteenth day of October, A. D. 1885.

"I cannot, in my county, find the within-named Benjamin Bowen this fifteenth day of October, A. D. 1885."

The garnishees answered, admitting an indebtedness to Bowen of \$141.49, and also that at the time of the service of the writ on Heitz, Lockwood had in his possession, in the state of Missouri, certain promissory notes belonging to Bowen, on various parties then in and resident of that state, and that before service of said writ on Lockwood the said notes were delivered by him to Bowen, in pursuance of a demand made therefor.

The notes in question amounted, in the aggregate, to \$336, and are conceded to have been worth as much as \$100. It is an undisputed fact that the notes, neither at the time of the service of the writ on Heitz, nor afterwards, were outside of the state of Missouri. Upon the service of the writ on him, it appears that the firm sent a dispatch to Lockwood, who was temporarily in Missouri, for the purpose of making a settlement with Bowen, informing him of the service of the writ. The latter, after taking legal advice, delivered the notes to Bowen, notwithstanding the service upon his firm, but on the same advice he declined to pay over to him the \$141.49 cash, and hence there is no controversy as to that.

The plaintiff filed a replication to the answer of the garnishees, and the issues of fact thus formed were tried before the court and a jury, resulting in a verdict for the plaintiff for the \$141.49 only, upon which the court entered judgment. On the plaintiff's appeal the appellate court affirmed the judgment.

The only question to be determined on the present appeal arises on the instructions given to the jury. The court, in a number of instructions, told the jury, in effect, that if they found the facts respecting the notes as above stated, they should find as to them for the defendants. The question thus raised is simply this: Can one be charged as garnishee in respect to promissory notes, or other evidences of indebtedness, executed by third parties, and belonging to the defendant in the attachment, which at the time of the service of the garnishee process, and during the pendency of the suit, were in another state?

So far as we are advised, this question is now before this court for the first time, though the courts of other states, in

giving a construction to their own statutes on the subject of garnishment, have frequently had occasion to pass upon it, and a number of them have answered the question directly in the negative. On the other hand, the case of *Childs & Co. v. Digby*, 24 Pa. St. 23, is the only one to which we have been referred which seems to hold to the contrary, and the rule as laid down in that case appears to have been since changed by statute, so as to make it conform to the holdings of the courts in the other states. We perceive nothing in this case to justify a departure from the general rule on the subject, as just indicated. That the rule has the merit of convenience and certainty is clear, and that it is sound on principle will fully appear from the following authorities: *Bates v. Chicago etc. R'y Co.*, 60 Wis. 302; 50 Am. Rep. 369; *Sutherland v. Second National Bank*, 78 Ky. 253; *Plimpton v. Bigelow*, 93 N. Y. 596; *Pennoyer v. Neff*, 95 U. S. 724; *Waples on Attachment and Garnishment*, 226, 227, 249, 334, et seq. The case of *Illinois Central R. R. Co. v. Cobb*, 48 Ill. 404, also has more or less bearing on the question.

The conclusion reached by the courts below appearing to be in conformity with the general current of authority, we perceive no cause for disturbing the judgment. It will therefore be affirmed.

PROPERTY OUT OF STATE CANNOT BE GARNISHED: *Bates v. Chicago etc. R'y Co.*, 50 Am. Rep. 369; and see *Gage v. Maschmeyer*, 72 Iowa, 696. But property of a non-resident in the hands of another party may be reached by garnishment, the property as well as the garnishee being within the jurisdiction of the court: *Molyneux v. Seymour*, 30 Ga. 440; 76 Am. Dec. 662.

HECKLE v. GREWE.

[125 ILLINOIS, 68.]

EXECUTION — TRESPASS BY SHERIFF. — PERSONAL PROPERTY OF TENANT IN COMMON IS EQUALLY EXEMPT from levy and forced sale as like interests in other property, where the possession as well as the title is several; and where such tenant, after notice of the execution, schedules and claims his interest as exempt under the statute, if such interest is thereafter levied upon and sold by the sheriff, the latter is liable in trespass under the Illinois statute in double the value of the property.

COURTS OF REVIEW REVERSE ONLY FOR SUCH ERRORS AS MAY HAVE BEEN PREJUDICIAL TO THE COMPLAINING PARTY; and where it is clear that the judgment upon the conceded facts is the only one that could properly be rendered, and that another trial would therefore necessarily result in the same way, an error cannot be said to have prejudiced a party.

George W. Fogg, for the appellant.

Carter and Govert, for the appellee.

MULKEY, J. Henry C. Mulligan, having recovered a judgment in the Adams circuit court for \$139.65, against the appellee, William Grewe, who was the head of a family, and residing with the same, caused a writ of *feri facias* to be issued thereon, and placed it in the hands of the appellant, Benjamin Heckle, the sheriff of the county, for execution. On being notified thereof, the appellee made out and delivered to the sheriff, in strict conformity with the statute, a schedule of all his property, amounting in value to about three hundred dollars, and claimed the same as exempt from execution. Most all of the property scheduled consisted of three mules, two coal-wagons, four sprinkling-wagons, and five sets of double harness, in which the appellee had an undivided half interest, as tenant in common with one A. H. Wissmann. The sheriff, under the instructions of the plaintiff's attorney, proceeded to levy upon the defendant's interest in the property, notwithstanding it had been scheduled and claimed by him as exempt under the statute, and subsequently, after the usual notice, sold the same, under the execution, for \$183.50. The defendant in the execution thereupon brought an action of trespass against the sheriff, to recover double the value of the property sold. The action is founded on sections 13, 14, and 17 of chapter 52 of the Revised Statutes, entitled Exemptions (Starr and Curtis's edition), the last section of which provides as follows: "If any officer, by virtue of any execution or other process, or any other person, by any right of distress, shall take or seize any of the articles of property exempted, as herein provided, from levy and sale, such officer or person shall be liable to the party injured for double the value of the property so illegally taken or seized, to be recovered by action of trespass, with costs of suit." The cause was tried before the Adams circuit court and a jury, resulting in a judgment of six hundred dollars for the plaintiff, which was subsequently affirmed by the appellate court for the third district, whence the case is certified, under the statute, to this court for review.

The undisputed facts are, as already indicated, that the property levied upon and sold by the sheriff belonged to appellee, as tenant in common with Wissmann; that the same was properly scheduled and claimed by the defendant in the

execution before it was taken and sold by the sheriff; that appellee's one-half interest therein did not exceed three hundred dollars in value, and that at the time the property was so taken and sold, appellee was the head of a family, and residing with the same. It therefore follows, that if, as matter of law, the interest of a tenant in common in personal property is in any case exempt, under our statute, from levy and forced sale, it clearly was in this. The lower courts both held that such interest in personal property stands upon the same footing, in respect to the exemption laws, as like interests in other property, where the possession as well as the title is several. That the lower courts ruled correctly on this question, we have no doubt. Being of this opinion, it would be a useless consumption of time to consider the other questions discussed in the briefs, for, accepting this as the law of the case, as upon the admitted facts we must, there was clearly no error in affirming the judgment of the trial court, even though some of its rulings may have been improper, about which we express no opinion. Courts of review reverse only for such errors as may have been prejudicial to the complaining party, and certainly no error or number of errors can, with any propriety, be said to prejudice a party, when it is clear, as it is here, that the judgment upon the conceded facts is the only one that could properly be rendered, and that another trial would therefore necessarily result the same way.

It is supposed by counsel that the view taken by the courts below on this question, and in which we fully concur, is not to be reconciled, in principle, with the case of *Troubridge v. Cross*, 117 Ill. 109. We are unable to perceive anything in that case which justifies the claim of counsel. The question there decided was, "whether one member of a firm can hold a homestead estate in the real estate of the firm, as against a copartnership debt, and without the consent of the copartner," and it was held that he could not. If the articles levied upon in this case were partnership property, and the claim sought to be collected were a partnership debt, then there would be a striking analogy between that and the present case; but as it is, there is scarcely any. Indeed, the differences between the ownership of property by a tenant in common, and the ownership of like property by a partner, are so many and elementary in their character, and withal so clearly defined in the law, that it would be useless to name them, or point out the legal consequences that respectively attach to them.

Being fully satisfied with the conclusion reached by the appellate court, its judgment will be affirmed.

EXEMPTION FROM EXECUTION OF PROPERTY OF CO-TENANTS: *McCoy v. Brennan*, 61 Mich. 362; 1 Am. St. Rep. 589, and note 593-595.

JUDGMENT WILL NOT BE REVERSED FOR RECEPTION of improper evidence, if the same result must have been reached had such evidence been excluded: *Parkhurst v. Berdell*, 110 N. Y. 386; 6 Am. St. Rep. 384; *Matthews v. Phelps*, 61 Mich. 327; 1 Am. St. Rep. 581; and see *De Laittre v. Jones*, 36 Minn. 519. Nor will a decree be reversed for an error in it which works no injury to the losing party: *Schulz v. Sweeny*, 19 Nev. 359; 3 Am. St. Rep. 888.

WEIGLEY v. MATSON.

[125 ILLINOIS, 64.]

RECORD OF COURT SHOWING JUDGMENT BY CONFESSION IN OPEN COURT IMPORTS VERITY, AND CANNOT BE CONTRADICTED BY PAROL EVIDENCE. The record of such judgment is the only proper evidence of itself, and is conclusive of the fact of the rendition of the judgment, and of all the legal consequences resulting therefrom.

EXECUTION ISSUED BEFORE JUDGMENT IS RECORDED. — Where judgment is part of proceedings in court in term time, it is not material whether record was actually written up or not at time execution issued.

ATTORNEY'S FEES MAY BE INCLUDED IN JUDGMENT BY CONFESSION AUTHORIZED BY WARRANT OF ATTORNEY. — Stipulation by which a debtor agrees to pay fees of his creditor's attorney in case the latter is compelled to resort to legal proceedings to collect his debt is an agreement which is not only eminently just, but which rests upon a good and valuable consideration.

Weigley, Bulkley, and Grant, for the appellant.

Flower, Remey, and Holstein, for the appellees.

By COURT. The opinion of the appellate court for the first district in this case is as follows:—

“BAILEY, J. The complainant having obtained a judgment against one Sea, and having levied his execution upon the property of his debtor, seeks by his bill to have certain prior judgments and executions against the same debtor, and in favor of other creditors, vacated and declared null and void, so as to give priority to the complainant's execution. The judgments attacked were entered by confession, and no claim is made that the indebtedness for which they were entered was not justly and in good faith due, nor are there any allegations of fraud or collusion. The claim to relief is based solely upon certain alleged irregularities on the entry of said judgments.

"The bill admits that said judgments purport to have been entered in open court, in term time, but it is alleged that in fact the branch of said court presided over by the judge before whom said judgments purport to have been entered was not in session on that day, and had not been opened for that term; that the declarations and cognovits were presented to the judge out of court; that he there indorsed thereon directions to enter judgments, and that said papers with such indorsements, being filed with the clerk, said judgments were entered by him.

"It is the settled rule of law that the record of a court showing a judgment by confession in open court imports verity, and cannot be contradicted by parol evidence: *Roche v. Beldam*, 119 Ill. 320. The record of such judgment is the only proper evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment, and of all the legal consequences resulting from that fact, both as against the parties to the judgment and all others whose interests may be affected thereby: *Koren v. Roemheld*, 7 Ill. App. 646; *Richardson v. Beldam*, 18 Id. 527; *Jasper v. Schlesinger*, 22 Id. 637.

"The complainant, then, by admitting that the judgments which he is seeking to have set aside purport to have been entered in open court, in term time, admits the existence of judgment records which furnish conclusive evidence that said judgments were so entered, and he has therefore precluded himself by such admission from insisting that the contrary is the fact.

"It is alleged that the executions are void because they were issued and delivered to the sheriff before the judgments were actually entered upon the records of the court. As the judgments were a part of the proceedings of the court in term time, it is not material whether the record of the judgments were actually written up or not at the time the executions were issued. Such was the conclusion reached by us on full consideration of this question in *Jasper v. Schlesinger*, *supra*.

"The point is made that the provision of the warrants of attorney as to attorney's fees was fraudulent as to other creditors, in that it appropriated the amount of such fees to the payment of the attorneys of the judgment creditors, without consideration. It is claimed that to the extent of such fees, at least, the judgments should be vacated. A stipulation by which a debtor agrees to pay the fees of his creditor's attorney, in case the latter is compelled to resort to legal proceedings

to collect his debt, is an agreement which is not only eminently just, but which rests upon a good and valuable consideration. It is not in the nature of a gratuity, but is a contract by which the debtor, in part consideration of the credit given him, agrees to indemnify his creditor against the consequences of his neglect or refusal to pay, whereby the creditor may be subjected to the necessity of employing and paying an attorney.

"We are of the opinion that the bill presented no grounds for relief. The demurrer was therefore properly sustained. Decree affirmed."

Upon an examination of the bill, and after full consideration of the arguments of appellant's counsel, we have come to the same conclusion as that reached by the appellate court. The reasons stated in the opinion of the court in support of the decision are satisfactory to our minds, and meet our approval. We therefore adopt the opinion of the appellate court as our own opinion in the case.

The judgment of the appellate court is affirmed.

JUDGMENT BY CONFESSION, ENTRY OF, ETC.: *Lee v. Figg*, 37 Cal. 328; 99 Am. Dec. 271, and note 277; *Cloud v. El Dorado County*, 12 Cal. 128; 73 Am. Dec. 526; *Cook v. Whipple*, 55 N. Y. 150; 14 Am. Rep. 202.

PENNSYLVANIA COMPANY v. SLOAN.

[125 ILLINOIS, 72.]

SUING PARTY BY WRONG NAME—PLEA IN ABATEMENT.—Where real party in interest is sued and served with process by wrong name, the misnomer must be pleaded in abatement; otherwise such party will be concluded by the judgment or decree rendered, the same as if he were described by his true name.

REVIEW OF QUESTIONS OF FACT.—WHERE ISSUE WHETHER PARTY WAS SUED BY WRONG NAME IS MADE ONE OF FACT by the pleadings, and as such is submitted to the jury and determined by the judgment of the appellate court, it will not be reviewed by this court.

TO IDENTIFY DEFENDANT AS SAME PERSON AS ONE SUED BY ANOTHER NAME, EVIDENCE IS ADMISSIBLE that the name in the original suit was that of a corporation which had been sold out under a foreclosure decree to another company, which continued the business under the same name, merely changing the word "railroad" to "railway"; that thereafter the "railroad" company ceased to do business, but retained its organization for the purpose of clearing up its affairs; that defendant was assignee of the lessee of the "railway" company, and was operating the road at the time of the accident in question; that defendant used signs, cars, and engines with the initials of the "railroad" corporation, and that the same lettering remained on the doors of the ticket and

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freight offices, with few exceptions; that plaintiff intended to sue defendant and served it with process, and that its attorney defended without pleading the misnomer in abatement.

LIABILITY OF LESSOR OF RAILROAD DOES NOT PREVENT LESSEE FROM BEING ALSO LIABLE FOR NEGLIGENCE of its servants or agents.

RIGHT OF RECOVERY FOR DEFENDANT'S NEGLIGENCE OR CARELESSNESS IS SUFFICIENTLY SET FORTH IN INSTRUCTION, that "if the jury believe from the evidence that a flagman of the defendant improperly and inopportunely signaled," etc., where it also appears that the words "carelessly" and "negligently" were in the declaration, and a preceding instruction had called attention to the case of one person being put in peril by the "negligence and misconduct" of another, and had also directed inquiry as to whether "the negligence of the defendant" had caused the alleged injury.

FLAGMAN OF RAILROAD COMPANY IS GUILTY OF NEGLIGENCE IN PERFORMANCE OF HIS DUTY, where plaintiff is injured in crossing a track with his team in consequence of being signaled to come on when a train, unseen by him but which the flagman was bound to observe, was moving nearer and directly towards the team.

PLEADING — STATUTE OF LIMITATIONS — AMENDED DECLARATION. — Where separate causes of action are set up in separate counts, and defendant pleads the statute to the whole declaration, plaintiff is entitled to recover if one of his causes of action is not within the bar; and where the original declaration counts upon the negligence of the engineer, and the amended declaration also alleges separately and in addition the negligence of the flagman, which latter, if a new cause of action, might have come within the statutory bar; the defendant to avail himself of such bar must plead separately to that portion of the declaration which has reference to the negligence of the flagman.

DAMAGES — LIMITING BELIEF OF JURY AS TO WHAT TESTIMONY SHOWS. — INSTRUCTION in action for personal injury, that if the jury "find the defendant guilty," they shall assess his damages, etc., proceeding to state the elements that may be considered in fixing the amount, ending with the words "as shown by the testimony," does not warrant the criticism that such amount is not limited to the jury's belief as to what the testimony shows, but allows any amount to be assessed. The finding defendant guilty presupposed a belief from the evidence in the truth of the facts referred to in previous instructions, which stated that if certain facts were found true it would be guilty.

George Willard, for the appellant

John Lyle King, for the appellee.

MAGRUDER, J. This suit was commenced in the circuit court of Cook County on July 3, 1874, by the appellee, to recover damages for personal injuries received July 5, 1872. On the latter day, appellee was riding in a buggy westward on Eighteenth Street in the city of Chicago, and came to Stewart Avenue, along which the railroad tracks of the appellant, ten or twelve in number, run from north to south, and

from northeast to southwest. He was there stopped by a train passing on one of the tracks farthest to the west, and waited for some time for an opportunity to get across. A number of stationary cars, standing on one of the easterly tracks south of Eighteenth Street, obstructed his view of the tracks between the stationary cars on the east and the moving train on the west. When the latter train had passed, he was signaled to come on and motioned to to hurry up by the flagman, whose duty it was to give signals of the movements of the cars and engines. Before he could cross the network of tracks, a train, backing up from the south, and theretofore hidden by the stationary cars, stopped his further progress by moving directly in front and so near as to touch the horse's head. The horse became frightened, and reared and plunged, and backed the buggy towards the east, where it was in danger of colliding with a locomotive advancing from the north, in appellee's rear. In this state of affairs, the whistle of the locomotive was suddenly blown, and increased the fright of the horse. In peril of his life from the train in front of him, the locomotive in the rear of him, and the plunging of the frightened horse, appellee jumped from the buggy, and received the injuries complained of.

The declaration charges that the servants of appellant were guilty of negligence in signaling appellee to advance across the tracks, when an approaching train, that he could not see, made it unsafe to do so, and in driving the locomotive along the track at that time, and needlessly and improperly blowing its whistle.

The suit, as originally begun by summons issued on July 3, 1874, was against the Pittsburgh, Fort Wayne, and Chicago Railroad Company. The *alias* summons, dated July 23, 1874, was served July 31, 1874, on R. C. Meldrum as agent. The original declaration was filed August 10, 1874, to which the general issue was pleaded. The first trial was had in April, 1876, and resulted in a verdict of three thousand dollars. A new trial was granted. The second trial took place in November, 1876, and resulted in a verdict of four thousand dollars. A new trial was again granted. The third trial began on March 26, 1877, but on March 27, 1877, leave was given to plaintiff to amend by substituting the Pennsylvania Company in place of the Pittsburgh, Fort Wayne, and Chicago Railroad Company, a juror was withdrawn, and the cause continued. The summons, issued and dated on March 27,

1877, was served on March 28, 1877, on the Pennsylvania Company, by reading to R. C. Meldrum, agent.

March 27, 1877, an amended declaration was filed, consisting of five counts, to which the Pennsylvania Company filed two pleas: 1. General issue; and 2. Statute of limitations; the latter plea being that action did not accrue within two years next before suit was brought. To the second plea four replications were filed, each of which was demurred to, and demurrer sustained as to second and third and overruled as to first and fourth. Issue was joined on the first replication, and two rejoinders were filed to the fourth. The rejoinders were demurred to, but the demurrer was overruled, and plaintiff elected to stand by it. June 4, 1877, an order was entered, substituting the Pennsylvania Company for the Pittsburgh, Fort Wayne, and Chicago *Railroad* Company.

In September, 1877, a third trial was had, resulting in verdict and judgment for three thousand dollars. An appeal was then taken to the appellate court, where the judgment was reversed and the cause remanded. The mandate was filed in October, 1880. Afterwards, in January, 1885, leave was granted to plaintiff to withdraw all replications then on file, and to file new replications to the second plea, upon the first of which issue was joined, and to the second and third of which rejoinders were filed and demurred to. A fourth trial was begun in September, 1885, but plaintiff withdrew a juror, and the cause was continued. The fourth trial was, however, again begun and finished in November, 1886, and resulted in verdict and judgment for five thousand dollars. The latter judgment has been affirmed by the appellate court, whence it comes before us by appeal.

The first of the new replications to the second plea averred that the defendant, the Pennsylvania Company, was a foreign corporation, possessed of and operating solely and exclusively the Pittsburgh, Fort Wayne, and Chicago Railroad, extending from Chicago to Pittsburgh, and all the cars, etc., and the servants, etc., running and operating same were the servants, etc., of the defendant, and the causes of action mentioned in the declaration were solely caused by the negligence of defendant's servants, etc.; that Meldrum was local and general agent of defendant in Chicago, and on July 3, 1874, plaintiff sued out summons, and impleaded defendant in the name of the Pittsburgh, Fort Wayne, and Chicago *Railroad* Company (the said Pennsylvania Company being known and reputed

as the Pittsburgh, Fort Wayne, and Chicago Railroad Company); that the *alias* summons against defendant in the reputed name of Pittsburgh, Fort Wayne, and Chicago Railroad Company was served, July 31, 1874, on Meldrum, as agent of Pennsylvania Company; that the Pennsylvania Company appeared by its solicitors, and without pleading in abatement, pleaded to the merits, etc. The replication then sets forth the trials in April and November, 1876, the amendment and substitution of March, 1877, the issuance of summons in March, 1877, against the Pennsylvania Company, and its service on Meldrum, as agent of that company, etc., and concludes as follows: "And so plaintiff says this suit is the same suit commenced against defendant in name of Pittsburgh, Fort Wayne, and Chicago Railroad Company, and that said causes of action accrued within two years before commencement of suit."

If the suit had been begun against the Pennsylvania Company by that name, it was undoubtedly commenced in time to escape the bar of the statute. The theory of the appellant is, that the action having been begun against the Pittsburgh, Fort Wayne, and Chicago Railroad Company was not begun against the Pennsylvania Company, and that the bar of the statute was complete as to the latter company because it was not made a party until 1877, more than two years after the cause of action accrued. To answer this position, appellee contends that the Pennsylvania Company was the company sued in the first place, but that it was merely sued by the wrong name, to wit, by the name of the Pittsburgh, Fort Wayne, and Chicago Railroad Company.

The law undoubtedly is, that where the real party in interest and the one intended to be sued is actually served with process in the cause, even though under a wrong name, he must take advantage of the misnomer by plea in abatement in such suit; and if he does not, he will be concluded by the judgment or decree rendered, the same as if he were described by his true name: *Pond v. Ennis*, 69 Ill. 341. If the Pennsylvania Company was the real party sued and served, though by the wrong name, it should have pleaded the misnomer in abatement. It did not do so. The first plea filed was to the merits.

The issue made upon the plaintiff's replication to defendant's second plea was, whether or not the Pennsylvania Company was sued and impleaded by a wrong name, and served with summons under a wrong name. The issue thus made was one of fact, and was submitted to the jury along with the

other facts. This question of fact, no less than the other questions of fact, is settled and determined, so far as we are concerned, by the judgment of the appellate court.

Defendant, upon the trial, introduced no evidence whatever under either plea. All the proof in the record was put in by the plaintiff. The latter called to the stand and examined several of appellant's officers, agents, and attorneys. It appeared from their testimony that foreclosure proceedings were instituted against the Pittsburgh, Fort Wayne, and Chicago Railroad Company in 1867, or at some date prior thereto; that the road was sold out under decree in such proceedings, and purchased by the Pittsburgh, Fort Wayne, and Chicago Railway Company, which was thenceforward its owner; that thereafter the Pittsburgh, Fort Wayne, and Chicago Railroad Company ceased to do business, ran no cars, operated no road, and simply retained an organization for the purpose of closing up its affairs; that the Pittsburgh, Fort Wayne, and Chicago Railway Company operated the road until June 7, 1869, and then leased it to the Pennsylvania Railroad Company, which latter company assigned the lease in 1870 or 1871 to the appellant, the Pennsylvania Company; that the appellant was operating the road and running the cars when the accident occurred, and when the suit was brought; that the cars on the track at that time were marked P. Ft. W. & C. R. R. & R. W.; the sign-boards were marked P. Ft. W. & C. Co.; the initials P. Ft. W. & C. Ry. were on the locomotives; the same lettering was on the windows of the freight and ticket offices, though the name of the Pennsylvania Company was also on the transom over the door, and on some of the windows; that Meldrum was general freight agent of appellant; that the officers of appellant were consulted about the accident, and made reports in reference to it to the main office in Pittsburgh; that appellant's attorneys filed the original plea and defended the original suit, etc. There was also testimony tending to show that the plaintiff intended to sue the company, which was running the cars at the time the injury was committed, and which was employing the servants charged with the negligence complained of; and it is undisputed that that company was none other than the appellant.

This testimony, which was strenuously objected to by appellant's counsel, was competent as bearing upon and tending to prove the issue of fact made upon the replication to the second plea. Indeed, it would seem to have been difficult for

any ordinary man to find out just what name, among the many names made use of, was the real name of the company whose servants were in charge of the cars and the tracks at the time appellee was injured.

We do not think that the objections, made by appellant to the instructions which were given upon the subject of the plea of the statute of limitations, are well taken. These objections fall with the objections to the testimony already referred to. The instructions in relation to the plea were based upon the testimony tending to show the use of the wrong name, and merely told the jury in substance that the statute of limitations did not apply, if the facts set up in the replication as above stated should be found from the evidence to be true.

While the Pittsburgh, Fort Wayne, and Chicago Railway Company, appellant's lessor, may have been liable for the injury, yet appellant, the lessee, was also liable. The railway company was not sued. The defendant originally sued was called the Pittsburgh, Fort Wayne, and Chicago Railroad Company. As the corporation formerly known by that name was virtually defunct, and existed only to wind up old business, and not to attend to new business, appellant's officers and agents could not have supposed that corporation to have been the defendant intended to be sued, when service was had upon appellant's own representative in Chicago.

The seventh instruction given for plaintiff begins with these words: "If the jury believe from the evidence that a flagman of the defendant improperly and inopportunistically signaled the plaintiff's team," etc. This language is criticised upon the alleged ground that it bases the right of recovery, not upon the negligence or carelessness of defendant's servant, but upon the question whether or not such servant performed his duty in an improper and inopportune manner. The words "carelessly" and "negligently" are in the declaration, and if they had been added to the words used in the instruction, the latter would have been more technically accurate. But we do not think it was sufficiently inaccurate to mislead the jury.

"Improper" means "not fitted to the circumstances." "Inopportune" means "unseasonable in time," or "at the wrong time." If the flagman signaled to the plaintiff to come on, when the circumstances were such as to require him either not to signal at all or to signal for a further waiting, or

if the flagman signaled to plaintiff to come on at a time when a train, unseen by plaintiff, but which the flagman was bound to observe, was moving near and directly towards the team, then such flagman was guilty of negligence in the performance of his duty. Moreover, the fifth instruction had called attention to the case of one person being put in peril by the "negligence and misconduct" of another, and had directed inquiry to the question whether the plaintiff, in the exercise of ordinary care, had been compelled by "the negligence of the defendant" to jump from his buggy.

The seventh instruction is also objected to as basing the right of recovery solely upon the action of the flagman, and not upon the action of the engineer in backing the locomotive and blowing the whistle. Inasmuch as the original declaration attributed the injury to the moving and whistling of the locomotive in the rear of the team, and to no other cause, while the amended declaration, filed in 1877, added the improper signaling of the flagman as a further cause of the injury, it is therefore claimed that the amended declaration set up a new cause of action which came within the bar of the statute. Both declarations claim damages for the same injury, and for the same fright to plaintiff's horse. Without, however, passing upon the question whether the case comes within the principle announced in *Illinois Central R. R. Co. v. Cobb*, 64 Ill. 128, it is sufficient to say that the negligence of the flagman and the negligence of the engineer are separately averred in separate and distinct counts, though they are also charged together in one of the counts, and that the plea of the statute of limitations is to the whole declaration. Where separate causes of action are set up in separate counts, and defendant pleads the statute to the whole declaration, plaintiff is entitled to recover, if one of his causes of action is not within the bar: 1 Chitty's Pleadings, 546; *Perkins v. Burbank*, 2 Mass. 81. The evidence tends to establish negligence on both of the grounds mentioned in the amended declaration. To justify him in making the point now raised, the defendant should have pleaded separately to that portion of the declaration which has reference to the conduct of the flagman.

The ninth instruction given for the plaintiff tells the jury that if they "find the defendant guilty," they shall assess his damages, etc., and then proceeds to state the elements that may be taken into consideration in fixing the amount of the

damages. In regard to this instruction, counsel for appellant says: "The amount which the jury are thereby allowed to assess is not limited to any belief on their part as to what the testimony shows." The criticism is not warranted. The enumeration of such effects of the injury as may be compensated for in damages closes with the words, "as shown by the testimony." Previous instructions had stated that the defendant would be guilty if certain facts should be found from the evidence to be true. The finding of the defendant guilty, as specified in the ninth instruction, presupposed a belief from the evidence in the truth of the facts referred to in such previous instructions.

The judgment of the appellate court is affirmed.

PROCESS SERVED ON DEFENDANT BY WRONG NAME is as effectually served as if served on him by his right name, and if in such case judgment is taken against him, it is as binding as if rendered against him by his right name: *Parry v. Woodson*, 33 Mo. 347; 84 Am. Dec. 51.

MISNOMER, WAIVER OF, IF NOT PLEADED IN ABATEMENT: *Trull v. Howland*, 10 Cush. 109; 57 Am. Dec. 85, note.

LIABILITY FOR INJURIES ON LEASED LINES OF RAILWAY: *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; 6 Am. St. Rep. 151, and cases cited in note 162; *International etc. R. R. Co. v. Dunham*, 68 Tex. 231; 2 Am. St. Rep. 484.

LIABILITY OF RAILROAD COMPANY FOR NEGLIGENCE OF ITS FLAGMAN stationed at crossing: *Sweeney v. Old Colony R. R.*, 10 Allen, 368; 87 Am. Dec. 644.

HARDING v. GIBBS.

[125 ILLINOIS, 85.]

OPTION OF LESSEE TO PURCHASE — WHEN NOT MATERIAL WHETHER LESSOR OR HIS GRANTEE GIVE NOTICE. — Where the contract is in any wise unilateral, as in case of an option to purchase, any delay in the party in whose favor the contract is binding is looked at with especial strictness, and where premises are leased with the option to the lessee to purchase within a time limited, after notice is given him of an offer of sale by a third party, and such offer is actually made and a deed of the same executed to such party, it is not material in a court of equity whether the lessor or the grantee give the required notice.

OPTION TO PURCHASE — CONSTRUCTION OF CONTRACT. — Where premises are leased with the right given lessee to purchase within one year, and a further proviso that if the lessor should receive an offer for the property, ten days' notice should be given lessee, and he should then have the privilege of purchasing on certain terms within a time limited, and if he did not purchase the lessor might sell, this will not be construed as an absolute option of purchase within one year, but that the lessee must make

his election in ten days after receiving notice of an offer by a third party to purchase, and if he did not then elect, the lessor was at liberty to sell, although such offer was made within the year.

George R. Grant and C. H. Morse, for the appellant.

Pliny B. Smith and William B. Gibbs, for the appellee.

SHELDON, C. J. This was a bill for specific performance of an agreement for the sale of certain real estate.

Frederick C. Gibbs, on March 25, 1885, took a lease from Uzziel P. Smith of the premises in question, for the term of five years from May 1, 1885. At the same time there was indorsed on the lease an agreement, signed by both parties, that during the first year of the tenancy the lessee was to have the privilege to purchase the premises at the sum of \$9,500, of which \$2,250 was to be paid in cash, \$2,250 on or before one year after date of delivery of a warranty deed, to be secured by note and trust deed, and the balance by the assumption of a note and trust deed already on the premises, for the sum of \$5,000. But if the lessor should have an offer for the property, ten days' notice thereof was to be given to the lessee, and he was to have the privilege of buying at said offer, said price, in any event, not to exceed nine thousand five hundred dollars; and if the lessee did not desire to purchase the property, the lessor should have the privilege of selling the same, but if the lessee should desire to purchase, he should be allowed thirty days to close the purchase; and in the event of the lessor having an offer for the property after the expiration of the first year, the lessee was to have the first privilege of buying at said offer. George F. Harding offered Smith for the property nine thousand five hundred dollars, assuming the mortgage and canceling some indebtedness, the balance, eleven hundred dollars, to be paid in cash. Harding took the property on those terms. A quitclaim deed of the property, bearing date April 1, 1885, was made to him by Abner C. Harding, who held the legal title to the property in his name, in trust for Smith. On May 9, 1885, a written notice signed by Smith was served on Gibbs, that Smith had an offer of \$9,500 for the property, and Gibbs did not make any election to purchase the same. A previous notice had been given some two or three weeks before, having signed to it the name of Smith, by Harding. On February 15, 1886, Gibbs made a tender to Harding of the money, and note and trust deed provided for in the contract, and offered to assume the five-thousand-dollar

mortgage then on the premises, and demanded a deed from Harding, which the latter declined to execute, on the ground that Gibbs's option had been determined by the notice of May 9th. Gibbs then filed this bill against Smith and Harding for the specific performance of the contract. The superior court decreed the relief prayed, and Harding took this appeal.

There is essentially no dispute as to the facts in the case, and the justification of the decree is rested by appellee's counsel on but the one point, that the notice of the offer of purchase of the property should have been given by Harding instead of by Smith. As there had been a deed of the property made by Smith to Harding before the giving of the notice, it is insisted that by such conveyance all right in the property passed from Smith and vested in Harding; that at the time of the giving of the notice, Smith had no right or interest with respect to the property, but that it was all in Harding, and that he alone could give the notice.

At the time Harding took his conveyance of the property, he took also an assignment of the lease between Smith and Gibbs, with an agreement indorsed thereon, signed by himself, that he does not accept the assignment of the lease, except upon the understanding and agreement that Smith shall give Gibbs notice of his offer for the property, and his purchase shall not be effectual until Gibbs's right to buy shall terminate under such notice. It is said Gibbs had no notice of this agreement. This may be; it does not appear by the record that he had, and we will consider the case irrespective of this agreement.

There was here but an option to purchase. The obligation was on only one side. Smith was obliged to sell, but Gibbs was not bound to purchase. Where the contract is in any wise unilateral, as in the case of an option to purchase, any delay in the party in whose favor the contract is binding is looked at with especial strictness: Fry on Specific Performance, sec. 733. Smith was willing to give Gibbs the privilege of buying the property during the first year of his tenancy, but he was not willing to lose the opportunity of making a sale during that time. So he does not give Gibbs an absolute option of purchase within one year at the price named, but gives the option with this express proviso, that if during the year Smith should have an offer for the property, and should notify Gibbs of it, Gibbs should thereupon have ten days in which to make an election whether he would purchase the land upon the

terms offered by such third party, and that if he should elect to so purchase, he should have thirty days in which to close the transaction. If, however, he did not so elect, then Smith was to be at liberty to sell the property. To avail himself of this option required strict compliance on the part of Gibbs. The precise condition had occurred here which terminated this option. There was an offer to purchase, notice by Smith to Gibbs of the offer, and failure of Gibbs to make an election to purchase at the price offered, within ten days after the notice. The fact that there had been a deed made under the offer was of no consequence to Gibbs. His was the superior right, and the exercise of his option, within the time limited, would have avoided the conveyance which had been made. The conveyance rather strengthened the case of appellant. It showed, not only an offer to purchase, but demonstrated that the offer was a real one. Had there been but a mere offer to purchase, there might have been doubts as to its genuineness. Whether the notice was given by Smith or Harding seems but a matter of so merely a technical character that it should not have favor in a court of equity. There is no substantial equity in it. The terms of the agreement required the notice to be given by Smith, as it was; but whether given by Smith or Harding, Gibbs knew there was a chance to sell the land, and his plain duty under the agreement was to exercise his option at once, within the ten days, and not let pass the opportunity to make a sale of the land. He could not consistently with any principle of fair and honest dealing, under the contract which he had made, destroy the opportunity of making a sale wait until the expiration of the year to see if there might not be an increase in value of the land, and then exercise his option to purchase. We conceive, too, that Smith had the right under the agreement to give the notice in order to the protection of his interest under the agreement. If only the purchaser from him, where there had been a sale, could give the notice, then, on the purchaser's omission to give the notice, Smith might lose the benefit of such sale, as Gibbs could avoid it by the exercise of his option thereafter.

The decree of the superior court will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

UNILATERAL CONTRACT IN WRITING SIMPLY GIVING OPTION TO PURCHASE LAND within a specified time, for a given time, is binding upon the

party only who signs it, and is binding upon him only for the time stipulated for the exercise of the option: *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417, and note 422.

TIME WHEN OF ESSENCE OF CONTRACT TO CONVEY: *Green v. Covillaud*, 10 Cal. 317; 70 Am. Dec. 725; *Dark v. Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732; *Belford v. Crane*, 84 Am. Dec. 155, note.

KREITZ v. BEHRENSMEYER.

[125 ILLINOIS, 141.]

COUNTY COURT IN ILLINOIS HAS JURISDICTION TO HEAR AND DETERMINE ELECTION CONTEST concerning the office of county treasurer, and such proceeding should be heard at the probate term.

PROCEEDING TO CONTEST AN ELECTION IS NOT A SUIT AT LAW.

PETITION IN PROCEEDING TO CONTEST ELECTION need not show names of persons whose ballots have been improperly counted, where the contest concerns a county office, and the ground of action is a miscount or neglect to properly count the ballots by the judges of election.

IDENTITY OF BALLOTS IN ELECTION CONTEST — WAIVER OF RIGHT TO DEMUR. — Although petition is demurrable because it does not specifically show the identity of certain ballots sufficiently to warrant a decree for their examination, yet if a party answers, makes an issue of fact, and gives evidence upon the general and indefinite as well as the specific allegations of the bill, he waives the objection.

ELECTION CONTEST. — ORDER WILL BE MADE THAT BALLOTS BE RECOUNTED if petitioner makes a *prima facie* case that there is a necessity therefor, and that they have not been tampered with.

ELECTION CONTEST. — LESS PARTICULARITY IS REQUIRED IN ANSWER OF DEFENDANT THAN IN PETITION.

BURDEN IS UPON PETITIONER ALLEGING ELECTION TO OFFICE to prove that a majority of legal votes were cast for him, and the production of ballots cast for him raises presumption *prima facie* that they were legal.

IN ELECTION CONTEST, PRESUMPTION THAT BALLOTS FOR PETITIONER WERE LEGAL may be overcome by evidence in rebuttal that such ballots were not those of legal voters when the allegation of election to office is denied by answer.

ELECTION CONTEST — WAIVER OF OBJECTION TO PLEADINGS — EVIDENCE. — Answer is subject to exception which alleges in general terms, without more specific mention, that ten illegal votes were cast for contestant, but the right to object to evidence relating to such votes is waived where no objection is raised to such indefinite allegations.

PAROL EVIDENCE TO CONTRADICT OR CHANGE BALLOT. — In election contest, witness may testify in rebuttal upon issue properly raised by the pleadings that he had voted a ballot designated by a certain number, may state whose name was on the ballot, and that its condition when recounted was different than when voted, as that it had been changed by a paster, or that the ballot was destroyed after it was cast, and another and different one put in its place.

IT WILL NOT BE CONSTRUED AS AN ADMISSION PRECLUDING CONTESTEE FROM SHOWING THAT BALLOTS RECOUNTED WERE NOT GENUINE or were

changed during the recount, where before the recount contestant stated to contestee that if any question as to identity of ballots cast with those to be recounted were made, the contestant wanted a judge or clerk of the district present, and that contestee making no question as to said identity, the recount proceeded without such judge or clerk being present.

ORDER TO RECOUNT BALLOTS DOES NOT CONCLUDE ALL INQUIRY as to whether they were really the ballots cast, or that they have the same names upon them as when cast.

PAROL EVIDENCE TO SHOW THAT BALLOT IS MISSING. — It may be shown in rebuttal that a ballot designated by number was voted for a certain candidate, and that at the time of recount there was no such ballot among the ballots of that precinct.

PAROL EVIDENCE THAT NO BALLOTS WERE RETURNED CORRESPONDING TO NUMBERS ON POLL-BOOKS. — It may be shown that certain persons were electors, for whom they voted, that each name appeared on the poll-books as having voted, and that no corresponding ballots were returned in the box.

IN ELECTION CONTEST, THE TIME OF OFFERING EVIDENCE IS UNIMPORTANT, where court at opening of trial states that offers of certain testimony might be made during the progress of the hearing, but that it would not hear or admit any such testimony at any time, such ruling being then excepted to by counsel.

WHERE STATUTE REQUIRES BALLOTS TO BE NUMBERED, IT WILL BE PRESUMED THAT OFFICERS DO THEIR DUTY until the contrary is shown, and that ballots were numbered as they were cast, and where no ballots were returned in the box corresponding to the required numbers, it will be presumed that they have since been abstracted or lost from the ballot-box.

WHERE STATUTE REQUIRES BALLOT TO BE NUMBERED, AND NO BALLOTS ARE RETURNED CORRESPONDING TO THE REQUIRED NUMBERS, it may be explained by evidence that they were omitted to be numbered, or were inaccurately numbered through mistake.

DESTROYING UNNUMBERED BALLOTS. — Where the statute provides that before an unnumbered ballot shall be rejected it shall be ascertained by the judges of election that the number of ballots in the box exceeds the number of names entered on each of two poll lists required by law to be kept, it will be presumed on a recount that the judges discharged their duty, and if there is an unnumbered ballot, that the poll lists did not agree; in such case it is erroneous for the court to destroy one of two unnumbered ballots without ascertaining whether the poll lists did agree.

DESTROYING UNNUMBERED BALLOTS. — Where the statute contemplates that ballots shall be correctly numbered, and that every ballot cast will have the voter's number thereon, a ballot unnumbered is improperly in the box, and should be destroyed; otherwise, if such ballot was actually cast by a legal voter.

VOTER MAY NOT TESTIFY AS TO WHAT FAMILY RECORD CONTAINS RELATIVE TO HIS BIRTHDAY, where he has never heard of such record until after election, and it is directly contrary to his father's prior statements and to the reputation in the family before that time. The record should be produced, and be shown when and by whom made, or if that is impossible, a proved copy should be produced.

BALLOT CONTAINING NAMES OF TWO PERSONS FOR SAME OFFICE, ONE WRITTEN, THE OTHER PRINTED, SHOULD BE REJECTED under statute providing that "if more persons are designated for any office than there are candidates to be elected," such part of the ticket shall not be counted.

TWO BALLOTS FOLDED TOGETHER MAY BE REJECTED, one being within the other, and the outside one alone being numbered, the statute requiring the names of the candidates voted for to be all on the same piece of paper; such ballots containing the names of the candidates on each is plainly an attempt to vote twice.

VOTER WHO KNOWS THAT HIS BALLOT WAS NOT ACCEPTED OR DEPOSITED IN THE BALLOT-BOX MUST INSIST UPON HIS RIGHTS, and furnish the evidence required by statute, to entitle his vote to be received; otherwise, it cannot be counted, notwithstanding he offered such vote to one of the judges, who took it and said "he would see about it."

EVIDENCE TO EXPLAIN A BALLOT. — IF VOTER HAS USED LETTERS OF A FOREIGN LANGUAGE to express candidate's name, it may be shown what word or words they make.

EVIDENCE OF VOTER'S INTENTION. — ERASURE OF NAME being shown, it may be proven that it was not done by voter, or that it was the result of accident, and not of intention, but where erasure is deliberate act of voter, it cannot be explained that by it he intended a different result from that implied by law.

BALLOT WITH ONLY MIDDLE NAME OF CANDIDATE WRONG SHOULD BE COUNTED for him, as John M. Kreitz for John B. Kreitz, the latter being ordinarily known and called John Kreitz, and being the only candidate of that name for the office in question, the former being ordinarily known and called Matt Kreitz, but not being a candidate for any office at that election.

BALLOT MAY BE COUNTED WHICH CONTAINS CANDIDATE'S SURNAME ONLY, although there are other persons in the county having same surname, it being shown that there was no other person of such name who was candidate for the same or any other office.

BALLOTS OBSCURELY IMPRESSED AND IMPERFECTLY WRITTEN MAY BE EXPLAINED by evidence that voter intended and attempted to express a certain candidate's name as he understood it, so far as such ballots could, by one able to read them, be given a sound which might be understood to be intended to express such name, or such name as it was pronounced by any number of people. But if there is no similarity of sound between the name as written on the ballot and the candidate's name, as might induce the one to be reasonably mistaken for the other, or to indicate that it was intended as a contraction for candidate's name, the ballots cannot be aided by extraneous proof.

ALTHOUGH CANDIDATE'S NAME IS WRITTEN ABOVE NAME OF OFFICE ON BALLOT, IT WILL BE CONSTRUED AS A VOTE FOR HIM where the printed name below name of office is erased.

VOTES ARE INTENDED FOR DIFFERENT OFFICES, INSTEAD OF BEING TWO VOTES FOR ONE OFFICE, although ballot contains the words "For County Treasurer," with candidate's name printed underneath, and under that and above the printed words "For County Superintendent of Schools" another name is written; the candidate's name which is printed under the last-named office being erased.

EVIDENCE IS NOT ADMISSIBLE TO SHOW FOR WHAT OFFICE VOTE WAS INTENDED, where printed name under the designation "For County Treas-

urer" is stricken out, and the name of one of the candidates for such office is written below the designation of a different office, and below the name of the candidate therefor.

CANCELLATION SHOULD NOT BE PRESUMED FROM MERE FACT THAT TORN BALLOT WAS FOUND IN THE BOX, the presumption being that the tearing was accidental, unless it be proved that it was done by the voter and was intentional, when the ballot will be deemed canceled.

BALLOTS SHOULD NOT BE COUNTED WHERE NAME OF OFFICE IS COMPLETELY CANCELED, although name of one of the candidates is written beneath such canceled name.

BALLOTS. — THERE IS NO CANCELLATION WHERE CANDIDATE'S NAME IS WRITTEN INTO NAME OF OFFICE, obscuring and partially obliterating it, such fact being susceptible of explanation as being accidental or unintentional.

RESIDENCE OF VOTER. — INTENT in good faith of voter to make a place his home for all purposes is a determining factor upon question of his residence, although he may know that at the end of a certain period, or at some future time, he must remove elsewhere, and designs so to do.

FOR THE PURPOSES OF VOTING, A DOMICILE ONCE GAINED DOES NOT CONTINUE UNTIL A NEW ONE IS ACQUIRED, nor does a right to vote at a particular poll or district continue until the right to vote elsewhere is shown.

WHAT CONSTITUTES ABANDONMENT OF RESIDENCE. —The shortest absence, if intended as a permanent abandonment, is sufficient, although the party may soon afterwards change his intention, but an extended absence, intended all the time as a temporary absence for a temporary purpose, followed by resumption of former residence, is not an abandonment.

ON THE QUESTION OF INTENTION TO ABANDON RESIDENCE, DECLARATION OF PARTY, THOUGH ADMISSIBLE, IS NOT CONCLUSIVE, but may be disproved by his acts.

DECLARATIONS OF VOTER SUBSEQUENT TO ELECTION ARE NOT COMPETENT TO PROVE THAT HE WAS DISQUALIFIED TO VOTE.

ALIEN-BORN WOMAN BECOMES CITIZEN UNDER ACT OF CONGRESS of February 10, 1855, where any such woman who might be naturalized is in a state of marriage to a citizen. The citizenship of a woman thus acquired is not lost by the subsequent death of her husband and her afterwards intermarrying with an alien, and her children under twenty-one also become citizens; but the effect of this naturalization does not extend to members of the family not children.

SECONDARY EVIDENCE OF THE CONTENTS OF NATURALIZATION RECORDS may be given when such records are destroyed. Such records are no wise different from other records.

PETITION to contest an election. It was alleged upon information and belief that, in certain places and districts specially noted in the opinion, the judges of election refused to count legal votes cast for the petitioner, etc., designating the number of votes so cast in each place, precinct, and district. In addition thereto, it was further alleged generally that in certain other places, precincts, and districts divers legal votes were cast for contestant which were not counted for him; and that certain

other legal votes were cast for him, but were by mistake counted for contestee; also that in said districts, etc., other illegal votes were cast and counted for contestee, and that other mistakes were made in counting votes in such precincts. The other facts sufficiently appear in the opinion.

C. A. Babcock, and Carter and Govert, for the appellant.

William McFaden, for the appellee.

SCHOLFIELD, J. Before proceeding to the merits of the case, we must pass upon a question of jurisdiction, and some questions of pleadings and practice.

1. It is objected that the county court had no jurisdiction in the case, because the summons was returnable to a probate term instead of to a law term.

It is provided by section 5 of the county court act (R. S. 1874, c. 37, p. 339), that "county courts shall have jurisdiction in all matters of probate; settlement of estates of deceased persons; appointment of guardians and conservators, and settlement of their accounts; all matters relating to apprentices; proceedings for the collection of taxes and assessments; and in proceedings by executors, administrators, guardians, and conservators for the sale of real estate for the purposes authorized by law, and such other jurisdiction as is or may be provided by law,—all of which, except as hereinafter provided, shall be considered as probate matters, and be cognizable at the probate terms hereinafter mentioned." It will be observed that the words, "and such other jurisdiction as is or may be provided by law," are unrestricted, and may, therefore, have application to matters to be considered at the probate as well as at the law term of the court, and that the last sentence of the paragraph expressly provides that all the matters of which the court may thus have jurisdiction shall be, not matters of probate, but considered as probate matters, and be cognizable at the probate terms, except as thereafter provided. Unless, therefore, it is in the statute expressly provided that contested elections shall be considered at law terms, it must follow, under this language, that they shall be considered at probate terms.

It is provided in section 7 of the same act, that "the county courts shall have concurrent jurisdiction with the circuit courts in all that class of cases wherein justices of the peace now have or may hereafter have jurisdiction, where the amount claimed

or the value of the property in controversy shall not exceed one thousand dollars; concurrent jurisdiction in all cases of appeals from justices and police magistrates, . . . and in all criminal offenses and misdemeanors where the punishment is not imprisonment in the penitentiary, or death,—all of which shall be cognizable at the law terms hereinafter mentioned.” The words, “class of cases wherein justices of the peace now have or may hereafter have jurisdiction,” clearly mean actions at law. This is clear, both from the limitation of one thousand dollars on the “amount claimed or the value of the property in controversy,” which can have no application where no amount in money and no property is sought to be recovered, and from the specific enumeration of the cases of which justices of the peace then had and still have jurisdiction, in section 13, chapter 79, page 639, of the Revised Statutes of 1874. Besides, from the very nature of chancery powers and jurisdiction, it would be absurd to assume that it could have been contemplated by the general assembly that they would ever be conferred upon justices of the peace. We had decided, previous to the date of this enactment, and then held, that a proceeding to contest an election was not a suit at law: *Moore v. Mayfield*, 47 Ill. 167; *People v. Smith*, 51 Id. 177. There is plainly nothing in this section conferring general chancery powers upon the county court, and we know of no other section in which such powers are conferred, and to be exercised at the law terms.

The 113th section of chapter 40 of the Revised Statutes of 1874, entitled Elections, provides that a person desiring to contest an election, etc., shall “file with the clerk of the proper court a statement in writing, . . . which statement shall be verified by affidavit, in the same manner as bills in chancery may be verified.” Then sections 114, 115, and 116 provide for the issuing of summons, its service and return, the taking of evidence, and the trial of the case, in like manner as in cases in chancery; and there is no other provision of the statute in regard to the term to which the writ shall be returnable. The ninety-eighth section of the act simply says, “the county court shall hear and determine contests of election of all other county . . . officers,”—and that includes this office,—and says nothing about when the proceeding shall be heard. It must therefore inevitably follow that this proceeding shall be heard at the probate term, because there is no other term provided for its hearing.

East St. Louis v. Wittich, 108 Ill. 449, is supposed by counsel for appellant to be opposed to this view. We think otherwise. That was a proceeding, under chapter 24 of the Revised Statutes of 1874, to assess the cost of improvement of a certain street in East St. Louis, and the issues must be tried by a jury: See section 31, article 9, of the chapter. And it is expressly provided that the hearing shall be conducted as in "other cases at law," and so we thought it followed it could only be tried at a law term. It may, moreover, be observed, that this objection does not question the jurisdiction of the court over the subject-matter or the person, but simply denies that the court existed at the time to which the writ was returnable, for the purpose of such adjudication. If we shall admit that to be true, what follows? Simply, that the orders then made were a nullity. At the February term appellant answered. That was a law term, and undoubtedly the court then might adjudicate if the parties were before it. Had appellant failed to answer, or failed to obey any order of the prior term, and the court had then coerced him into obedience,—to doing that which it could not have compelled him to do but for the prior order,—the validity of the order at that term would be before us for investigation. But appellant might have answered without summons and without any previous order; and if the previous order is a nullity, he is to be assumed, in the absence of coercion, as having voluntarily answered. If he did so, the court thereafter had jurisdiction of his person, and having jurisdiction of the subject-matter, it lawfully proceeded.

2. It is objected that the court was not authorized by the pleadings, nor by the preliminary proof of the identity of the ballots, to decree an examination of the ballots. We are of opinion that it is not indispensable in such cases that the petition shall show the names of the persons whose ballots have been improperly counted. More particularity in pleading is not required than the notice of the subject is reasonably susceptible of, and it is obvious, in the very nature of things, that in most instances the candidate defeated by a miscount cannot know whose ballots were miscounted. All he can be expected to know is, that about so many ballots were deposited for him at a given poll, and that the count does not agree therewith. If he knows more, it is accidental. Nor, in such case, is it of consequence whose ballot was miscounted, for the effect is the same, and the mode of proof is precisely the same, whether it was cast by one legal voter or another. It is, more-

over, evident that the information upon which the contestant acts must, to a very great extent, be hearsay. He cannot be expected to have been personally at each poll, much less to have known how each elector voted. Nor can he be expected to have personally supervised the counting at each poll, -- and therefore, however grossly and palpably he may have been wronged at several polls, all that he can say truthfully in respect to most of it is, that he is informed and verily believes.

We are therefore of the opinion that as to the polls, counts, etc., at Melrose, Burton, Ursa, Mendon, McKee, Honey Creek, Liberty, Redfield, and the third, fifth, sixth, tenth, twelfth, fourteenth, fifteenth, and sixteenth election districts of the city of Quincy, the petition is sufficient. As to the other polls, it clearly was not, had the objection been taken by demurrer and adhered to. It is a clear and most palpable violation of the right of a secret ballot to allow a party, on mere suspicion, to have the ballots exposed and subjected to scrutiny, to enable him to find objections upon which to make a tangible charge. But appellant answered, and made issues of fact, and gave evidence upon the general and indefinite as well as the specific allegations of the bill, and thus waived the objection.

As respects the preliminary proof of the identity of the ballots, it is alleged in the petition that "said judges of said respective precincts and districts thereupon [i. e., after counting the ballots at the several polls] caused the ballot-boxes containing the ballots voted in the said respective precincts and districts, with their said certificate of the number of votes, last above named, to be forwarded to the county clerk of Adams County, Illinois, who, together with two justices of said county, within four days of said election, opened the returns of said election, and canvassed the same, as required by law." Appellant, in his answer, admitted that "after the polls were closed, a count was made by the judges; . . . that said judges of said precincts, except in the case of the township of Ellington, thereupon caused the ballot-boxes containing the ballots voted at said respective precincts, with their certificate of the number of votes cast thereat, to be forwarded to the county clerk of Adams County, and that said clerk and two justices, afterwards, and within four days of said election, opened the returns of said election from all said precincts, including Ellington, and canvassed the same." It is unnecessary to notice the answer as to Ellington, since appellant lost

nothing by the recount of the vote at that poll, and was not therefore injured by it.

We think, under the admissions of the answer, the preliminary proof was sufficient. It does not follow, from the fact that ballots are ordered to be recounted, that all question of whether they have been tampered with is concluded. If the petitioner makes a *prima facie* case that there is a necessity that they be recounted, and that they have not been tampered with, the order to that effect will be made. But an inspection of the ballots alone, upon a recount, might furnish ample evidence that they had been tampered with and changed since cast; and where one ballot is taken out, and another ballot, of the same general appearance, but for a different candidate or candidates, is put in its place, it can only be learned after an inspection of the ballots, upon a recount, by the voter declaring that it has been changed. Hence, after the recount, and consequent opportunity for inspection of ballots, it is competent for the incumbent to show that the ballots have been changed, if such is the fact, or that they are, in any respect, to be discredited for other cause.

3. Appellee contends that appellant was improperly allowed to introduce evidence proving that certain persons who had voted for appellee, whose names are not given in his answer, were not legal voters.

In *City of Beardstown v. City of Virginia*, 81 Ill. 544, Eason and Mains had each voted for removal, but the election judges refused to count them because they deemed them double ballots. On the trial, satisfactory evidence was introduced that they were in fact not liable to the objection, and the court then counted them for removal. It was objected that there was no allegation in the answer under which this could be done; but we said: "The bill alleges that a majority of the legal votes cast at said election were not for removal, but against it. The answer denies the allegation. Under such allegation and denial, we regard the evidence as properly admitted."

Less particularity is required in the answer of the defendant than in the petition: 1 Daniell's Chancery Practice, 3d Am. ed., 727. It is, among other things, alleged in the petition that appellee was actually elected to the office of treasurer, and to sustain this allegation it was incumbent on him to prove that a majority of the legal votes cast at the election were cast for him. It is true that the production of ballots cast for him raised the presumption, *prima facie*, that

they were legal; but the burden of proof, nevertheless, was upon him, and it was therefore incumbent upon him to introduce evidence of the ballots in the first instance. Appellant denied that allegation, and under that denial was entitled to rebut the presumptive case thus made by appellee, by disproving the *prima facie* case made by the ballots, and this he did, by showing that they were not what they purported to be,—that they were not the ballots of legal voters. Aside from this, however, there is a general allegation in the answer that over and above the illegal votes mentioned specifically in the answer, ten illegal votes were counted for appellee for the office of treasurer. Undoubtedly, this allegation is too indefinite, and if the answer had been excepted to, an exception to that allegation should have been sustained. But it was not excepted to, and therefore what has been said in respect to the too general allegations of the petition, in respect of a number of the polls, is applicable here.

This brings us to specific rulings on the merits of the case.

1. Appellant, after appellee had concluded evidence on his behalf as to the condition and in explanation of ballots cast at the election, introduced Joseph W. Davis, who testified that he voted at the election in Clayton township, and appellant then proposed to prove that the witness voted ballot numbered 143 at that poll, and that when he voted it, it had the name of John B. Kreitz for county treasurer printed on the ticket, and that it did not then have a paster stuck on and placed over the name of John B. Kreitz, and that it was uncrossed, and was, plainly to be seen, a ticket for John B. Kreitz for county treasurer; that the ticket, when recounted, had a paster, on which was printed the name of C. F. A. Behrensmeyer, pasted over the printed name of John B. Kreitz, and that the name of Behrensmeyer was not on the ticket at the time witness voted. Counsel for appellee objected to the admission of this evidence, for the reason alleged, “that the evidence, if it ever could be admissible, presupposed fraud or improper conduct on the part of the election officers, and there is no charge of the kind in said Kreitz’s answer, herein filed, as to the officers of the election of Clayton township; that hence the evidence is not now admissible; that a ballot, after once in the box, cannot be contradicted or changed by parol evidence,—at least not without fraud charged, which is not done in the answer in this case, and because there is nothing in said Kreitz’s said answer to found the evidence offered on, and be-

cause the identity of the ballots counted by the judges of election with those counted on the recount of Clayton township, of which this ballot was one, was admitted by contestee before proceeding to such recount." The court sustained the objection, and refused to allow appellant to prove or to give evidence of the facts, or of any of them, and appellant excepted. It was at the same time proved that the witness was a legal voter at that poll. The witness was then asked for whom he voted for treasurer. This was objected to, for the reason that the ballot is the best evidence of that fact, and the court sustained the objection, and appellant excepted.

Following this objection in its order, it is manifestly not true that the evidence necessarily presupposes fraud in the election officers, for the paster may have been put on the ticket by a third party when their attention was absorbed by their official duties in taking in or counting other ballots, or in preparing and signing their returns; or it may have been put on the ticket since the ballots left their hands, by stealth and artifice, and without the knowledge or gross neglect of any officer having custody of the ballots. But even if it be admitted that it does presuppose fraud in the election officers, it is to be kept in mind that the proper canvassing officers having found and declared Kreitz to be elected, the presumption is, that he was elected, until the contrary is clearly established; that Behrensmeyer, in alleging that he was elected, and that Kreitz was not elected, by a majority of the legal votes cast at the election, assumes the affirmative, and consequently, that the burden is upon him to clearly prove that a majority of the legal votes cast at the election were for him. It is immaterial that the production of a ballot received by the judges of election is *prima facie* evidence that it is cast by a legal voter, for that affects only the order of giving evidence, and does not change the issue. As we have before indicated, appellant's denial of the allegation of the petition that Behrensmeyer was elected, and that Kreitz was not elected, by a majority of the legal votes cast at the election, simply closed the issue. It then devolved upon appellee to make out, by evidence, at least a *prima facie* case, and when he had done so, appellant was entitled to introduce evidence to show that the evidence thus introduced and relied upon by appellee was not what appellee claimed it to be, and consequently, that what he introduced as legal ballots were not, in fact, legal ballots. Were appellant to raise a new issue,—one not presented

by the petition,—the burden and order of introducing evidence would, of course, be directly the reverse; but that is irrelevant to the question before us.

It is undoubtedly true that a voter cannot be allowed to say that he voted for one person, when he admits that he cast a ballot, which has not since been changed, showing that he voted for another person. But this is merely upon the principle that a writing cannot be contradicted by parol. It is, however, always competent to show that even the most solemn writings are forgeries; and a ticket which has been changed by a paster to read as a vote for a man for a particular office different from the man for whom it read as a vote in the condition in which it was when cast, is a forgery. And the same is true where the ballot, after it is cast, is destroyed, and another and different ballot is put in its place. Quite clearly, therefore, this evidence would have proved that one ballot counted for appellee was not evidence of a lawful vote cast for him, but, on the contrary, that the vote should be counted as a vote cast for appellant, and was therefore directly responsive to the allegation of the petition.

What is relied upon as an admission of the identity of the ballots cast and recounted is thus recited in the record: "And the recount of the ballots returned to the clerk of the county court next hereinafter named, as cast at the said election for said office of county treasurer, at the [here the poll is named], in said Adams County, being about to proceed, the said Behrensmeyer, the said contestant, stated to said Kreitz and his attorneys that if any question as to the identity of the ballots cast at said [naming the poll], with those about to be produced and counted by said Haselwood, were made, the said contestant wanted a judge or clerk of said last-named district present, and would send for such judge or clerk, and have him present before proceeding to a recount of said last-named ballots; and thereupon, the contestee making no question as to said identity, the recount of said last-mentioned ballots proceeded without the presence of such judge or clerk." Very clearly, this cannot be construed into an admission that the ballot was not changed after the recount of that pole was commenced and before that ballot was reached, which may have been the fact,—in other words, it is not an admission that no ballot of that poll would be thereafter changed before recounted. But is also further quite evident that it could not have been intended an admission as to matters of which appel-

lee could then know nothing. He doubtless then knew that the election officers supposed they had, and that they intended to count the ballots as they received them and placed them in the ballot-box, and that the same ballots were intended to be put up by them, and that they believed they were, and returned to the county clerk, as provided by statute. But the election officers could not know what was on the face of a ballot until they opened and read it; and since, in reading off the names on a ballot, and ascertaining the number of votes for the particular candidates for the respective offices, they are not required to take cognizance of the number which each ballot bears, but, on the contrary, they are by section 87, chapter 46, of the Revised Statutes of 1874, expressly forbidden, under severe penalties, from comparing the ballot with the poll-book, so as to ascertain by whom the ballot was cast, it is impossible that they could know whether a ballot bearing a particular number—as, for instance, that of this ballot—had an erasure or paster on it; and all that they could know is, that the general appearance of the ballots, as a whole, is the same, or, by extreme possibility, that so many names for this office were erased and another name substituted, and so many pasters with one name upon it were pasted over another name; and waiving evidence simply waives that which is susceptible of evidence.

But aside from this, this admission was for the mere purpose of dispensing with preliminary proof. In order to recount the ballots, it was assumed, and properly so, a necessity should be shown, and the *prima facie* identity of the ballots to be recounted established. What the ballots might disclose when re-examined, no one could know in advance, and necessarily the proof to be thereafter offered could not be anticipated. When the recount was gone into, the purpose of the preliminary proof, and necessarily this admission, was accomplished; and it violates the fundamental rule of construction that words are to be limited by their meaning, as applicable to the object in view, when they are used to hold that this admission goes beyond the right to recount the ballots. It is not contended, and it cannot be reasonably, that the mere fact that ballots are recounted concludes all inquiry as to whether they are really the ballots cast, or that they have the same names upon them as when cast. The court therefore erred in excluding this evidence.

Appellant introduced Charles H. Matzenbacher, whose tes-

timony proved that he was a lawful voter, and voted, at this election, in the ninth district of the city of Quincy, and appellant then offered to prove by him that he voted ballot numbered 330, at that poll, and that when he voted it the name of John H. Kreitz, for county treasurer, was upon it; that his name was not erased or scratched; that the name of Behrensmeyer was not then interlined upon the ballot, under the name of John B. Kreitz, but the ballot was plainly a ballot for John B. Kreitz for county treasurer, and that the ballot was changed by erasing the name of Kreitz and interlining the name of Behrensmeyer, after he voted it. Appellee objected to the introduction of the evidence, and the court sustained the objection, to which appellant excepted. This objection, we must assume, as the record discloses no reason, is predicated upon the same reasoning as the objection to the testimony of Davis. What we have said in respect to that objection is equally pertinent here. The court erred in excluding the evidence.

Appellant also offered to prove by J. T. Seehorn, whom he showed to have been a legal voter, and to have voted, at this election, at the ninth election district in the city of Quincy, that he voted for John B. Kreitz for treasurer; that his ballot was numbered 28, and he offered to prove by other evidence that there was, at the time of the recount, no such ballot among the ballots of that precinct. Appellee "objected generally, and because there is nothing in said Kreitz's answer herein as to any abstracting of ballots in the said ninth precinct, or of any misconduct of election officers, of such kind, that there is nothing in said answer to file said proof on," and the court sustained the objection, and refused to allow the evidence to be given, and appellant excepted. We have already shown that evidence of this kind is competent, as rebutting the evidence given by appellee to make out his case in chief. Appellant could not have mentioned it in his answer, because he could not have known that the ballot was missing until the ballots were examined for recounting, which was long after the issues were made up. For aught that we can know, the ballot may have been inadvertently lost after the ballots were opened to be recounted, but before the recount of that poll was completed. Whether the ballot was lost by inadvertence or stolen by design, appellant was entitled to the benefit of it. It was one of the lawful votes cast for him for treasurer. The court clearly erred in this ruling.

Appellant also offered to prove by Charles Henry Matzenbacher that he was acquainted with twenty-five different persons, whose names were given; that each and all were voters, at this election, in the ninth precinct of the city of Quincy; that they all voted, at that election, in that precinct, for John B. Kreitz for county treasurer; that the names of each and all appear upon the poll-books of that precinct as having voted; that each name on the poll-books has a number opposite to it, and that no ballots were returned in the box corresponding to these numbers on the poll-books. Appellee objected to the introduction of the evidence, "on the ground that the evidence was incompetent generally; that it related to ballots in a precinct where, at the time of the recount, the question of the identity of the ballots with those counted had been conceded; that in the order of trial, as marked out by the court, the evidence was not admissible at this time; that the evidence offered belonged to the case in chief; that the ballots and poll-books of the ninth precinct are the best evidence; that the evidence offered is secondary, and relates to ballots not declared ambiguous by the court, and because there is nothing in contestee's answer apprising contestant of any alleged change of ballots in this precinct, or any allegation therein on which to found the proof." The court sustained the objection, and refused to allow the evidence to be given, and appellant excepted. The record does not disclose whether the court sustained the objection on all of these grounds; but it is to be inferred from the rulings upon the questions we have just been considering, that it was on the ground that the identity of the ballots had been conceded, and that the objection had not been specially raised in the answer. This objection, however, as the one last before considered, could not have been set up in the answer, for it could not have been known when the answer was filed. But the same reasoning is applicable here that was applicable to the objection to the matters offered to be proved by Davis, except as to the suggestion that "in the order of trial marked out by the court, the evidence was not admissible at that time." But unfortunately, under the ruling of the court, it would have been admissible at no other time.

It appears from the abstract before us that at the January term, 1887, of the court, the court fixed the seventh day of February, 1887, for the commencement of the hearing, and then "held and announced that offers of testimony as to other

ballots not held by him patently ambiguous might be made by the parties during the progress of the testimony, if they saw proper; but that he would not hear or admit any such testimony at any stage of the case." This was, at the time, excepted to by appellant. The time, then, when this evidence was offered was unimportant, because it was thus ruled out at the opening of the trial. It was equivalent to saying: "It makes no difference when you offer it; I rule it out now." The counsel had a right to assume that the time of offering it was of no consequence, -- that offering it was purely formal; and the court was notified, by the exception then taken, that appellant would stand upon his legal right to introduce such testimony. If the court ever changed this determination, the record fails to show it. If it was in fact changed, it was due to appellant's counsel to notify him of it in time to have procured and introduced his evidence. If it be true, as the offer supposes, and the objection by implication admits, that these parties voted, and numbers were placed opposite their names, but no corresponding ballots were in the box, the poll-books and ballot-box already before the court proved it, and appellant was entitled to have it considered on the hearing.

While we held in *Hodge v. Linn*, 100 Ill. 402, that the failure to number any of the ballots cast at a particular poll was not sufficient reason for setting aside the return of that poll, it being proved that the omission was through a misapprehension of duty, and with no fraudulent intent, still the statute requires the ballots to be numbered, and the presumption being that officers do their duty, it must be presumed, until the contrary is shown, that these ballots were numbered as they were cast, and that they have since been abstracted or lost from the ballot-box. It is provided by section 51, chapter 46, of the Revised Statutes of 1874, each clerk of the election shall keep a poll-list, which shall contain a column headed "Number," and another headed "Names of Voters." The name of each elector voting shall be entered upon each of the poll-books by the clerks, in regular succession, under the proper headings. And it is provided by section 55 of the same act: "The ballot shall be folded by the voter, and delivered to one of the judges of election. . . . The clerks of the election shall enter the name of the voter, and his number, under the proper heading, in the poll-books, and the judges shall indorse on the back of the ticket offered the number corresponding with the number of the voter on the books, and

shall immediately put the ticket into the ballot-box." And this being done, the ballot must always bear the same number that is on the poll-books opposite the name of the voter.

It is undoubtedly susceptible of explanation that ballots are omitted to be numbered, or are inaccurately numbered through mistake; and so here, had this evidence been admitted, as it should have been, the burden would then have been upon appellee to show, if such was the fact, that the ballots, as cast, were actually in the box, but by mistake either bearing no number or a different number than that opposite the name of the voter; and in the absence of such proof, it would have been presumed that appellant was fraudulently denied in the count the benefit of that many votes. *Prima facie*, therefore, the effect of this offer is to prove that the number of votes indicated were cast for appellant, and not counted for him on the recount of this poll, in addition to the number that were then actually counted for him, and in that view the court clearly erred in excluding the evidence offered.

On the recount of the sixteenth precinct, the court found two unnumbered ballots, both for appellant, and by examining the poll-list returned with the ballot-box, it was determined that there was one more ballot than names on the poll-list. The court therefore destroyed one of these unnumbered ballots. The statute provides that each clerk of the election shall keep a poll-list, one of which is to be kept in the ballot-box, and the other returned to the county clerk: R. S. 1874, c. 46, secs. 51-62. And section 57 of the same chapter requires that the judges, after the polls are closed, shall count the ballots, and that "they shall first count the whole number in the box. If the ballots shall be found to exceed the number of names entered on each of the poll-lists, they shall reject the ballots, if any be found upon which no number is marked." Now, this duty, it is to be presumed, was discharged by the judges of election, and assuming, as appellee does, that the ballots are the same, either the court made a mistake in counting, or the poll-lists did not agree. It is, however, quite as reasonable to assume that the poll-lists did not agree as that there was a mistake in any other respect, and it admits of no controversy that there was a mistake in omitting to number at least one of the ballots. The statute requires, it will be noted, before the ballot shall be destroyed, that it shall be ascertained that the number of the ballots in the box "exceeds the number of names entered on each of the poll-lists," and that

was not here done, and the action of the court was therefore erroneous.

It is contended by appellant that in no event was the court authorized to destroy the ballot, because it is said it was no fault of the voter that it was not numbered. If it be conceded that the numbered ballot was actually cast by a legal voter, this position will be true. But the statute contemplates that the ballots shall be correctly numbered, and hence that every ballot as cast will have the number of the voter indorsed upon it, and this being done, it must follow that the unnumbered ballot is improperly in the box, and it should therefore be destroyed.

Frederick C. Inman voted for appellant in the third precinct of Quincy. The court held him to be an illegal voter, and rejected his vote upon his own testimony. He testified: "I thought I was twenty-one years old when I voted, but I find that I was twenty-one the sixth of last February." Being asked, "This month?" he answered, "Yes." On cross-examination, question and answer proceeded thus: "How did you come to believe that you were twenty-one? My father had told me I was twenty-one. Is your father living here? No, sir; he lives in Crown Point, Indiana. Did he ever live here? Yes. Up to what time? The 8th of March last. And how long have you been informed by him that you were twenty-one years old? Since the primary election." He was afterwards asked: "What was your reputed birthday in the family?" and he answered, "1865, February 6." He further said that he had never known to the contrary until after the last election; that from the time he could remember he always counted his birthday from that date; that he celebrated his sixteenth birthday sixteen years after February 6, 1865. On redirect examination he was asked, "Well, what does your family record say?" That was objected to, but the court overruled the objection, and permitted the witness to answer; and he said, "The family record says I was born February 6, 1866." This was clearly error. This family record, which he never heard of until since the election, speaking directly contrary to his father's statements prior to the election, and to the reputation in the family before that time, should have been produced, or if that was impossible, a proved copy should have been produced. It should have been shown when and by whom the record was made. It cannot be said this witness has any knowledge of his own, confirmatory of the record, and his

whole story looks extremely suspicious. For aught that appears, the record may have been made for the case. At all events, he may have misunderstood its language, and parol evidence of his conclusion of what it proves ought not to have been received.

Ballots—some claimed for one party and some claimed for the other—were rejected by the court in a number of instances, because there were the names of both appellee and appellant—the one written and the other printed—on the same ballot for treasurer. Appellee contends, on the authority of *People v. Saxton*, 22 N. Y. 309, 78 Am. Dec. 191, that such ballots should have been counted as for the person whose name was written,—that writing the one name was in effect canceling the other name printed. The reasoning of *People v. Saxton*, *supra*, only applies to cases where it is shown that the voter, with his own hand, writes the name of the candidate. Where a ballot is furnished a voter by another party, already having upon it a printed and a written name, as may quite often be the case, there can be no reason for saying that the ballot, as to him, is anywise different from one having both names written or both names printed upon it, for no act of his has caused it to be as it is. But our statute seems to us imperative. It says: "If more persons are designated for any office than there are candidates to be elected, . . . such part of the ticket shall not be counted for either of the candidates." And this was held obligatory as to this class of tickets in *Clark v. Robinson*, 88 Ill. 500.

In several instances, two ballots were folded together,—the one within the other,—and the outside one alone numbered. The judges of the election omitted to count them, but fastened them together, marked "double ballots," and they were returned to the county clerk with the other ballots. The court refused to count either of such ballots, and this we think was right. The statute requires the names of the candidates voted for all to be written or printed on the same piece of paper: R. S. 1874, c. 46, sec. 54. Inclosing one ballot within the other, with the names of the candidates upon each, was plainly an attempt to vote twice, and therefore such a fraud upon the rights of other electors as required that his ballot should not be counted: *Webster v. Gilmore*, 91 Ill. 324.

August Sieckman proved, by his own testimony, that he was a legal voter in the eleventh precinct of the city of Quincy; that he then, and for many years past, had resided

in that precinct, in the house which had belonged to his mother, but which, she dying, he and his sister had jointly inherited; that he took his meals in the ninth precinct, but his home was and had been in this house in the eleventh precinct; that he gave his ballot to one of the judges, who took it, and said "that he would see about it," but he subsequently refused to deposit it in the ballot-box. Appellant insists that this ballot ought to have been counted for him. We think the court below properly refused to count it. The voter knew that the ballot was not accepted as a vote. He knew it was not deposited in the ballot-box, and he should have furnished the evidence required by the statute to entitle his vote to be received, and have insisted upon his rights. Whether the judges were culpable in not receiving his ballot is not pertinent here. It is sufficient that they did not receive it.

The question is presented by rulings on ballots, some of which are counted for one party and some of which are counted for the other party. To what extent is evidence admissible to explain a ballot, or show the intention of the voter in casting it?

In *People v. Matteson*, 17 Ill. 167, it was held that votes designating the office voted for as "police justices" should be counted as votes for "police magistrates," there being but one office coming within the reasonable contemplation of the words "police justice," and that designated by the statute "police magistrate." The court said: "In election contests, as in other cases, the question to be determined depends upon facts to be ascertained, and here we are simply called upon to determine, from the evidence before us, the simple fact of the intention of the voters who cast their votes. Did they intend to vote for the relators to fill the offices for which this election was ordered?"

In *Clark v. Robinson*, 88 Ill. 508, it was said: "Three votes cast, respectively, for W. E. Robso, Robertson, and W. E. Robers, were counted for appellee, to which objection is made. These votes were cast for circuit clerk. The evidence shows that there were no candidates for circuit clerk at the election, except appellant and appellee. We can have no doubt, from the evidence, that these three votes were intended for the appellee. 'Robso' and 'Robers,' no doubt, were abbreviations for the name of appellee, and the cause of the abbreviation is apparent from the ballots alone." Another ballot, containing the name of "Robin__" written on the margin to

the left of "For Circuit Clerk," and with a continuation at the end, with a light mark, having the name of Clark erased, it was held should be counted for Robinson. It may not be improper to observe with reference to the ticket for Robertson, as to which nothing was said, that the court felt bound to take judicial cognizance that "Robinson" and "Robertson," as ordinarily pronounced, especially by unlettered and careless talkers, were *idem sonans*, being in accordance with the literal spelling of neither, — "Robison."

In *McKinnon v. People*, 110 Ill. 305, ballots were cast for Henry Malzacher and for Joseph Malzacher, for the office of town clerk. It was held competent to prove that Henry Malzacher was the Democratic candidate for that office, and Donald McKinnon the Republican candidate, and that there were no other candidates for the office; that no person resided within the town of the name of Joseph Malzacher, and that the name Joseph Malzacher was printed on a number of Democratic tickets by mistake, supposing that Henry was named Joseph, and that such tickets got circulated to some extent, and voted, by mistake, supposing that Joseph, and not Henry, was the Democratic nominee for the office. And we held the votes thus cast for Joseph should be counted for Henry.

An analogous case is *Carpenter v. Ely*, 4 Wis. 420, referred to and quoted from in that case. In laying down the rule in *McKinnon v. People*, *supra*, we quoted, with approval, from Cooley on Constitutional Limitations, first edition, section 611, that "evidence of such facts as may be called the circumstances surrounding the election, such as, who were the candidates brought forward by the nominating conventions; whether other persons of the same name resided in the district from which the officer was to be chosen, and if so, whether they were eligible, or had been named for the office; if a ballot was printed imperfectly, how it came to be so printed, and the like, — is admissible for the purpose of showing that an imperfect ballot was meant for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself, or unless the ballot is so defective that it fails to show any intention whatever."

There is less difficulty in stating the rule in general terms than in applying it to particular cases. Manifestly, it would not be competent to hear the voter say that he intended a ballot plainly for a particular name, for one having no such simi-

larity of sound as that one might reasonably be intended for the other; and it is quite as obvious that it is competent to prove, by the elector, what he understood the names of the candidates to be, and how he reads his ballot. If he has used the letters of a foreign language to express the name, it is competent to prove, by the voter, or by some one else versed in that language, what word or words they make. If the characters are so complex in their formation, or so imperfectly formed, or so obscurely impressed, as to make it difficult to read them, it is competent to prove, by any one understanding them, what they are. What is not admissible is to show that something was intended which is plainly contradictory of what was done,—as, for instance, that a ballot cast with the name of Jones for a particular office upon it was intended to be a vote for Smith for the same office. And so, upon like principle, where it is shown that there has been what appears to be an erasure of a name, it may be shown that it was not done by the voter, or that it was the result of an accident, and not of intention; but the fact of erasure being conceded to have been the deliberate act of the voter, it cannot be explained that by it he intended a different result than that which the law implies from it.

It was in proof that John B. Kreitz was the Democratic nominee, Charles F. A. Behrensmeyer the Republican nominee, and B. L. Dickerman the Prohibition nominee, for the office of treasurer of Adams County, and that there were no other candidates for that office at the election in November, 1886. It was also in proof that some tickets bore the name of John M. Kreitz for the office of county treasurer, and that John B. Kreitz had a brother of that name, who had at a former time held the office of sheriff of said county, and perhaps also some minor office at a still prior time. But it was, on the other hand, proved that John B. Kreitz was ordinarily known and called John Kreitz, and that John M. Kreitz was ordinarily known and called Matt Kreitz, and that John M. Kreitz was not a candidate for any office at that election. Ordinarily, the middle letter is no part of the name, and, under the circumstances mentioned, the trial court properly attached no significance to it. The vote was evidently intended, as it was counted, for John B. Kreitz. It was likewise in proof that there were other persons than appellee in Adams County of the name of Behrensmeyer, and appellant objected to many ballots counted for appellee which had merely Behrensmeyer

upon them, for treasurer, without any designation of the christian name. It was shown that no other Behrensmeyer was a candidate, at that election, for the office of treasurer, or any other office, and we think, therefore, the court properly counted the ballots as cast for appellee.

Appellant also objects that parol evidence was admitted to explain what name was intended by certain obscurely and imperfectly written ballots which were counted for appellee. So far as those ballots could, by one able to read them, be given a sound which might be understood to be intended to express the name Behrensmeyer, or that name as it was pronounced by any number of people, we think the evidence was properly admitted. There was evidence that some persons pronounced the name as Benmire, and perhaps that others pronounced it by a still shorter name. Any evidence, therefore, proving that the voter had intended and attempted to express appellee's name as he understood it was properly admissible. Objections of a like character were made to tickets counted for appellee, and of course the same rule was properly applied there. It is evident that imperfect spellers might spell Kreitz, "Krietz," "Kritz," "Critz," or even omitting the "z."

We recall only two instances in which we think the rule in this respect was misapplied. In certain ballots, it was claimed the name written for treasurer was "John B. Knirs," and in certain other ballots it was claimed the name written for treasurer was "Dehbsumeyer." If these letters were really employed, we think the ballots could not be aided by extraneous proof, since we discover no such similarity in sound between these names and the names of the candidates as might induce the one to be mistaken for the other, and plainly neither can be intended as a contraction of the name of the candidate. It is not improbable, however, that this results from a misapprehension of the characters employed.

In many tickets the name of the candidate for treasurer, as printed, is erased, and the name of the other candidate is written over the name of the office, as thus:—

(Written)— CHARLES F. A. BEHRENSMEYER.

For County Treasurer:

(Printed)— ~~JOHN B. KREITZ~~. (Erased in pencil.)

The same thing also frequently occurs with reference to the office next below, which is that of county superintendent of schools, for which John Jimison was the Democratic candidate,

and Newton J. Hinton the Republican candidate, and that causes what, at first blush, seems to be, and appellant claims is, a ballot with two votes for county treasurer, as thus:—

For County Treasurer:

(Printed)— CHARLES F. A. BEHRENSMEYER.

(Written)— JOHN JIMISON.

For County Superintendent of Schools:

(Printed)— ~~NEWTON J. HINTON.~~ (Erased in pencil.)

We think in the first-named instance it may fairly be construed as a vote for county treasurer, as thus, "Charles F. A. Behrensmeyer, for county treasurer": McCrary on Elections, 2d ed., sec. 397. And in that view, in the last instance the vote is "for John Jimison for county superintendent of schools," and not two votes for treasurer.

A different case, however, is presented in a few other ballots, where the printed name is stricken out of the ballot, and no name is written immediately above or immediately below the designation, "For County Treasurer," but the name of one of the candidates for county treasurer is written below the designation, "For County Superintendent of Schools," and below the name of a candidate for that office. Here is, palpably, upon the face of the ballot, no vote for county treasurer, and two votes for county superintendent of schools. The rule seems to admit of no evidence of what was the intention, under these circumstances. There is no ambiguity. The facts present simply the question, May the voter do one thing, and say that he meant something entirely different? The court properly held that he could not.

Two ballots were found in the box of one of the polls, each torn from top to bottom, across all the names, into two distinct fragments, with ballot numbers on one of the fragments of each ballot. The question is, Should that have been treated as a cancellation? or should they have been counted? Since voting a canceled ballot is a useless and senseless act, we think cancellation should not be presumed from the mere fact that a torn ballot is found in the box, but that, on the contrary, it should be presumed that the tearing was accidental. It may, however, be proved that the tearing was by the voter, and intentional, and upon such proof being made the ballot will be held to be canceled. There was no such proof here, and the ballots were therefore properly counted.

In one or more instances the name of the office was completely canceled, but the name of one of the candidates was written beneath the canceled name of office. On the authority of *Clark v. Robinson, supra*, such ballots were properly not counted.

In some ballots the name of the candidate was written into the title of the office, obscuring and partially obliterating the letters designating the name of the office. We think it was at least susceptible of explanation that this was accidental and unintentional, and hence no cancellation.

The question arises on a number of ballots,—on some counted for each party,—What constitutes the “permanent abode” of the elector, prescribed by the statute as an indispensable requisite to the right to vote? We held in *Dale v. Irwin*, 78 Ill. 170, that it “means nothing more than a domicile,—a home,—which the party is at liberty to leave as interest or whim may dictate, but without any present intention to change it”; and that ruling has been adhered to in other cases. This was sufficiently accurate as applied to the facts in those cases, but there is an obvious inaccuracy in the latter part of the quotation when considered with reference to some of the facts in the present record, and we cannot better state it and our views thereon than by quoting from the report made in the case of *Cessna v. Meyers*, appendix to second edition of McCrary on Elections, bottom of page 489, and top of page 498. It is there said: “A man may acquire a domicile if he be personally present in a place and elect that as his home, even if he never design to remain there always, but design at the end of some short time to remove and acquire another. A clergyman of the Methodist church, who is settled for two years, may surely make his home for two years with his flock, although he means at the end of that period to remove and gain another.” And again: “Suppose a man, single, with no property, to come from Ireland, and be employed all his life on railroads, or other like works, at different places in succession. If he does not acquire a residence he can never become a citizen, because he never would reside in this country at all. It seems to us that to such persons the general rule above stated [i. e., in substance, the rule as quoted from *Dale v. Irwin, supra*] does not apply. Where a man, who has no interests or relations in life which afford a presumption that his home is elsewhere, comes into an election district for the purpose of working on a railroad for a definite or

an indefinite time, being without a family, or having his family with him, expecting that the question whether he shall remain or go elsewhere is to depend upon the chances of his obtaining work, having abandoned, both in fact and intention, all former residences, and intends to make that his home while his work lasts, that will constitute his residence, both for the purpose of such jurisdiction over him as residence confers, and for the purpose of exercising his privileges as a citizen. Of course the intent above supposed must be in good faith, and an intent to make such district the home for all purposes. The party's intent to vote in the district where he is, he knowing all the time that his home is elsewhere, will not answer the law."

It can, under our system, need no elucidation that a man cannot be entitled to vote, at any one time, in either of two places, as he shall elect; and it is, in one or more instances in this record, pertinent to keep in mind that it does not follow, because a man must have a domicile somewhere, and that a domicile once gained remains until a new one is acquired, that a man must be entitled to vote somewhere, or that the right to vote at a particular poll, being once established, is presumed to continue until the right to vote elsewhere is shown. Permanent residence is but one of the requisites of the right to vote, and it must, in this state, always precede the election by an extended space of time,—in one respect for a year, in others for ninety and thirty days, respectively: Const., art. 7, sec. 1. But abandonment of a residence is instantaneous, and if it be, by a voter, of a residence in one voting district, at a date too near the election for the requisite intervening time of residence to be a voter in another voting district to which he has removed, the voter will be entitled to vote in neither voting district.

We have frequently held that when a party leaves his residence, or acquires a new one, it is the intention with which he does so that is to control. Hence the shortest absence, if at the time intended as a permanent abandonment, is sufficient, although the party may soon afterwards change his intention; while, on the other hand, an absence for months, or even years, if all the while intended as a mere temporary absence for some temporary purpose, to be followed by a resumption of the former residence, will not be an abandonment. On the question of intention, the declaration of the party, though admissible, is not necessarily conclusive, because it may be disproved by his acts,—as thus: If a party were to remove his family to a

particular district, there build and furnish them a home, keep his property there, return there constantly as leisure allowed, and remain there with him family during sickness and unemployed time, this would constitute his residence, notwithstanding he might be employed in labor in another district, and claim that to be his residence: *People v. Holden*, 28 Cal. 124; for on questions of domicile, less weight is given to the party's declarations than to his acts: 3 Jacob's Fisher's Digest, tit. Domicile, p. 4225; *Lessee of Butler v. Farnsworth*, 4 Wash. C. C. 103.

The controlling inquiry would seem to be, where, if at all, does the party actually make his home, and claim, for the time, to exercise rights of property or of citizenship incident to or resulting from permanent residence. And therefore, if a party having no family leave, or having a family take it with him and leave, this state, and go to another state and there make a home, and seek to acquire rights by virtue of its being a permanent residence, such as acquiring a homestead under the acts of Congress, or exercising the rights of an elector, to which permanent residence is a requisite, his subsequently testifying that he had never intended to permanently abandon his residence here, but had all the time intended at some future day to return, could not control. There must be a present continuous citizenship, with its attendant incidents and rights, subject, of course, to certain necessary guards against fraud, somewhere, and if it be here, it cannot be abroad; and if it be claimed and exercised abroad, that is conclusive that it had at that time ceased to be claimed here.

The question is made material, by objections raised upon the trial, to what extent is evidence of the declarations of the voter competent to prove that he was disqualified to vote. In *City of Beardstown v. City of Virginia*, 81 Ill. 542, we refused to follow the English rule, which permits any declarations of a voter tending to prove that he was not qualified to vote to be given in evidence in a contest where his right to vote is drawn in question, and held that declarations of a voter subsequent to the election were incompetent, and we have no inclination to now depart from that ruling. Since the question of the intention, as well as of the act of the party in leaving a particular abode and adopting and retaining another, is the subject of proof, it must follow that evidence applicable to either is admissible, and that although less weight is given to the party's declarations than to his acts, still his declarations of

his mental state, so long as that shall be the subject of inquiry, must be admissible; and so it is held that conversations and declarations in regard to present or future domicile, although not accompanying acts, are admissible in evidence, and must be weighed with the other evidence. Although the lowest species of evidence, they are competent: 3 Jacob's Law Dict., tit. Domicile, 1, p. 4225. Upon this principle, in *Thorndike v. Boston*, 1 Met. 242, it was held that a letter written from the plaintiff to his agent in Boston, before the controversy in litigation arose, in which he expressed his intention not to return to Boston, was admissible in evidence. And again, in *Kilburn v. Bennett*, 3 Id. 199, declarations of a party's future intention to change his domicile were held admissible. It is obvious that a declaration that a party, at a particular time, was residing in one place, would be negative evidence that he was not, at that time, residing in another; or a declaration that he was intending to change his residence would negative the idea that he was intending to remain; and so, also, the reverse.

Question was raised as to whether certain persons were citizens, — having been alien born, — and also as to sufficiency of proof of naturalization. It was held in *Kelly v. Owen*, 7 Wall. 496, that the act of the 10th of February, 1855, which declares that "any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to, a citizen of the United States, shall be deemed and taken to be a citizen," confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide, — i. e., free white persons; that the terms "married," or "who shall be married," do not refer to the time when the ceremony of marriage is celebrated, but to a state of marriage; that "they mean that whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes by that fact a citizen also." The citizenship of a woman thus acquired is not lost by the subsequent death of her husband, and her afterwards intermarrying with an alien: See Opinions of Attorney-General, vol. 15, p. 559. And the children of such a woman, under the age of twenty-one years, become citizens by virtue of her citizenship: *Dale v. Irwin*, 78 Ill. 186; *City of Beardstown v. City of Virginia*, 81 Id. 541; *United States v. Kellar*, 11 Biss. 314; *Leonard v.*

Grant, 6 Saw. 603; *People v. Newell*, 38 Hun, 78. We are, however, aware of no authority holding that the effect of this naturalization will extend to members of the family who are not children. Records of naturalization are nowise different from other records. When destroyed, secondary evidence of their contents may be given, just as may secondary evidence of the contents of any other record be given.

The views expressed necessarily lead to a reversal of the judgment below, and upon another trial the rules herein stated will, we apprehend, enable the trial court to dispose of all the material controverted questions.

The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

ELECTIONS — JURISDICTION TO HEAR AND DETERMINE ELECTION CONTEST: *State v. Kempf*, 69 Wis. 470; 2 Am. St. Rep. 753, and note 755; *Mayor etc. v. Fledderman*, 67 Md. 161.

REGISTRATION LAWS, CONSTITUTIONALITY OF: *State v. Corner*, 22 Neb. 265; 3 Am. St. Rep. 267, and note 273; *Commonwealth v. McClelland*, 83 Ky. 686.

ELECTIONS — QUALIFICATIONS OF VOTER — RESIDENCE: *Fry's Election Case*, 71 Pa. St. 302; 10 Am. Rep. 689; *People v. Board of Registration*, 26 Mich. 51; 12 Am. Rep. 297; *Sinks v. Reese*, 19 Ohio St. 306; 2 Am. Rep. 397; *Pedigo v. Grimes*, 113 Ind. 148; registration: *Gooding v. Brown*, 22 Fla. 437; *Smith v. City of Wilmington*, 98 N. C. 343.

EVIDENCE OF RESULT OF ELECTION — POLL-BOOKS AND TALLY-SHEETS: *Dixon v. Orr*, 49 Ark. 238; 4 Am. St. Rep. 42, and note 45; *Powell v. Holman*, 50 Ark. 85; *Rigsbee v. Board of Commissioners*, 99 N. C. 341.

PERFECT BALLOT IS EXCLUSIVE EVIDENCE OF VOTER'S INTENT, and extrinsic evidence is inadmissible to show a contrary intent: *Wimmer v. Eaton*, 72 Iowa, 374; 2 Am. St. Rep. 250, and see note 252; *People v. McNeal*, 63 Mich. 294. But where the ballots cast at an election are not safely kept by the proper legal custodian, and are so exposed as to give an opportunity for tampering with them, they cannot be relied on in a contest as to the result of the election: *Powell v. Holman*, 50 Ark. 85; *Fowler v. State*, 68 Tex. 30; *Pedigo v. Grimes*, 113 Ind. 148.

IN CONTESTED ELECTION CASE, VOTERS THEMSELVES MAY TESTIFY FOR WHOM THEY VOTED, but cannot be compelled to do so: *Dixon v. Orr*, 49 Tex. 238; 4 Am. St. Rep. 442; and see *Pedigo v. Grimes*, 113 Ind. 148. But where the elector casts his vote by secret ballot which is fatally defective, he ought not to be permitted to testify that he voted the particular ballot, and intended it for a particular candidate: *Anderson v. Winfree*, 85 Ky. 597; and see *Wimmer v. Eaton*, 72 Iowa, 374.

FAILURE TO NUMBER BALLOT OF VOTER AT ELECTION, while an irregularity, is not of such a character as to deprive the voter of his vote: *O'Hair v. Wilson*, 124 Ill. 351.

MERE IRREGULARITY ON PART OF ELECTION OFFICERS, or their omission to observe some merely directory provision of the law, will not vitiate the poll: *Anderson v. Winfree*, 85 Ky. 597. But it must be made to appear by

those claiming benefit from the election that such irregular conduct has not prevented an honest and fair election: *Fowler v. State*, 68 Tex. 30.

IN ELECTION CONTEST, BURDEN OF PROOF IS UPON PARTY WHO SEEKS to set aside the returns, and they cannot be invalidated by merely showing that the ballots, after being counted, have been so exposed to the public as to be unworthy of credit: *Powell v. Holman*, 50 Ark. 85. The ballots not having been so kept that they might not have been changed, the parol evidence of the judges of election as to the result of the ballot as counted and declared at the polls is admissible: *Stemper v. Higgins*, 38 Minn. 222; and see *Dixon v. Orr*, 49 Ark. 238; 4 Am. St. Rep. 42.

NICHOLS v. SARGENT.

[125 ILLINOIS, 809.]

GUARDIAN IS PERSONALLY BOUND BY PROMISE MADE ON SUFFICIENT CONSIDERATION TO PAY DEBT OF HIS WARD, although he expressly promises as guardian, and this principle applies to covenants in lease of ward's property to purchase at end of term improvements made by tenant, but a debt so paid may be recovered back from estate of ward.

CONTROVERTED QUESTIONS OF FACT WILL NOT BE REVIEWED where submitted to jury and decided below.

APPROVAL OF PROBATE COURT OF AWARD BY APPRAISERS OF VALUE OF IMPROVEMENTS by lessee of ward's property is not required, where lease by guardian, made with approval of probate court, contains provisions relative to mode of appraisal.

Hutchinson and Partridge, for the appellant.

Dexter, Herrick, and Allen, for the appellee.

SCOTT, J. This was an action of covenant on that clause of the agreement to renew the lease that had formerly existed between the parties, which, it is said, obligates defendant personally to purchase, at the expiration of the lease, the improvements put upon the demised premises by plaintiff, "at the valuation of three persons," to be selected as in the lease provided. The renewal agreement is signed by defendant, Annie E. Nichols (formerly Annie E. Haven), "Annie E. Nichols, guardian." The premises seem to belong to defendant and her minor children, for whom she was guardian at the time of making the lease. It is recited in the original lease it is between "Annie E. Haven in her own right, and as guardian" for her three surviving children, and plaintiff, Homer E. Sargent. In the declaration, the covenants contained in the lease upon which breaches are assigned are declared upon as the personal covenants of defendant, and the first question presented is, Did defendant, by executing

the agreement to renew the lease, become personally liable to perform the covenant it contained for the purchase of the improvements made by the tenant on the demised premises?

The precise question made in this case was made in *Sperry v. Fanning*, 80 Ill. 371, and it was there held, if a person makes a contract, describing himself as guardian or trustee for another, and so signs the same, he will be personally liable, in the absence of an express provision showing clearly that both parties agreed to act upon the responsibility of the fund in his hands, alone, or upon some other responsibility, or there appear some other circumstances clearly indicating another party who is bound by the contract, and upon whose credit alone it is made. The principle of that case is, if a guardian promises, on a sufficient consideration, to pay the debt of his ward, he is personally bound by it, although he expressly promises as guardian. In such cases, where the guardian discharges the debt of his ward, he may have indemnity out of the estate of his ward, or if he has been discharged from his guardianship, he may have an action against the ward or his estate, as for money paid for his use. The facts in both cases are so nearly analogous, no reason is perceived why the case being considered is not controlled, in every respect, by the case cited. An effort is made, however, to distinguish this case from *Sperry v. Fanning*, on the ground that in the latter case the agreement made by the guardian was not made with the approval of the probate court, as was done in the case now before this court. In that respect there is no difference between the cases. It appears from the dissenting opinion, the contract made by the guardian in *Sperry v. Fanning* was made with the approval of the probate court, and that is persuasive evidence, at least, of the existence of that fact in the case.

The declaration seems to be framed upon the theory, defendant had refused to submit the valuation of the improvements to the appraisers, as is provided in the lease shall be done. Whether defendant did refuse to go on with the appraisement is a controverted question of fact, and as it was found against defendant by the trial and appellate courts, it is not subject to review in this court.

It is said there was an offer to go on with the appraisement, if plaintiff would consent the award should be subject to the approval of the probate court before it should be binding on the guardian or the ward's estate, and inasmuch as plaintiff

would not consent to that proposition, there was, in law, no refusal. Plaintiff was not bound to submit to the conditions imposed by the guardian. He very properly insisted his rights should be determined and ascertained by and under the lease. That was his clear right; and on the refusal of defendant to submit to the appraisal, as provided in the lease, it is but just and right plaintiff should recover as for the value of the improvements in controversy. In no other way could he obtain full damages for the breach of the covenants of the lease. The probate court had once approved of that mode of ascertaining the value of the improvements on the demised premises. Neither the law nor his contract required that plaintiff should submit the matter again to the probate court for any further action.

Most, if not all, of the other questions discussed in the elaborate arguments of counsel are controverted questions of fact not subject to review in this court, and of course need not be noticed.

The judgment of the appellate court will be affirmed.

GUARDIAN IS NOT PERSONALLY LIABLE ON CONTRACTS OF WARD without an express undertaking in writing to that effect: *Overton v. Beavers*, 19 Ark. 623; 70 Am. Dec. 610. Lease of ward's estate by guardian: *Webster v. Conley*, 46 Ill. 13; 92 Am. Dec. 234.

PARTY CONTRACTING WITH GUARDIAN TO ERECT BUILDINGS ON PROPERTY OF INFANT WARD has no equitable lien upon the property for the value of the improvements, if the contract was made without any legal authority on the guardian's part, and with full knowledge of the title and condition of the property on the part of the other party: *Guy v. Du Uprey*, 16 Cal. 195; 76 Am. Dec. 518.

CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY v. WEST.

[125 ILLINOIS, 320.]

CONTROVERTED QUESTIONS OF FACT WILL NOT BE RECONSIDERED.

MASTER AND SERVANT — NEGLIGENCE. — RAILROAD COMPANY is not liable if servant in causing injury to another is not acting within the scope of his employment; but master is responsible, where servant acts within the general scope of his employment, for acts done while engaged in his master's business, with a view to the furtherance of that business, by which injury is caused to another, whether negligently or wantonly committed.

RAILROADS. — ENGINEER ACTS WITHOUT THE SCOPE OF HIS AUTHORITY IN INVITING A PERSON TO RIDE ON THE ENGINE, and if injury is suffered

by such person without further fault on the part of the engineer or other servants of the company, it is not liable.

ENGINEER MUST USE REASONABLE CARE IN PUTTING PERSON OFF ENGINE; it is negligent conduct in engineer, for which his employer is answerable to direct child only seven years old to get off engine while in motion, although such child was wrongfully there.

INSTRUCTIONS NOT APPLICABLE TO FACTS MAY BE REFUSED.

E. Walker, for the appellant.

Selden Fish, for the appellee.

SCOTT, J. This appeal is from a judgment of affirmance by the appellate court for the first district of a judgment rendered by the trial court in favor of Walter West, who sues by his next friend, Elizabeth West, against the Chicago, Milwaukee, and St. Paul Railway Company. The action was to recover for personal injuries to the beneficial plaintiff, occasioned by the improper conduct of defendant's servants in putting him off an engine, on which it is alleged plaintiff had been riding by the invitation of the engineer. Of course, evidence in relation to controverted questions of fact cannot be discussed, and the argument addressed to this court on that branch of the case will not be considered.

Among the controverted questions of fact made before the jury were, first, as to how plaintiff got on the engine,—whether by the invitation of the engine-driver, or otherwise; and second, whether he was on the engine at all. It is insisted on behalf of plaintiff that he got upon the engine by the invitation of the engine-driver, and that he was injured by the negligent conduct of the engineer in putting him off without first stopping the engine; and on the part of defendant it is claimed plaintiff was not on the engine at all, but that he was injured in attempting to get on a flat-car while the train was in motion, without any knowledge on the part of the train-men that he was trying to do so. There is testimony tending to sustain both positions. The jury, by their verdict, sustained plaintiff's theory of the case, and as there is testimony tending to support the verdict, since that finding has been affirmed by the appellate court, the finding of the latter court is conclusive on this court. It will therefore be assumed, in the consideration of the questions of law discussed, that plaintiff was on the engine by invitation of the engine-driver, and that the injuries sustained by him were caused by the negligent manner in which plaintiff was put off the engine while in motion. It is not necessary for this court to express an opinion whether

it would have found the same way, from the evidence, the trial and appellate courts did. The statute provides this court shall not reconsider controverted questions of fact. That is the appropriate work of the courts through which the cause has come to this court. It has now passed that stage where controverted questions of fact can be reviewed.

Undoubtedly the law is as counsel states it to be, that where the relation of master and servant exists between the railway company and the person whose act is the cause of injury to another person, the company is not liable if the servant, in causing the injury, is not acting within the scope of his employment; but, on the other hand, the law is equally well settled that the master is responsible, where the servant acts within the general scope of his employment, for acts done while engaged in his master's business, with a view to the furtherance of that business, by which injury is caused to another, whether negligently or wantonly committed. Applying these general principles of law, the case in hand will be found to present no serious difficulty. Conceding, as must be done, the engineer invited plaintiff to ride with him on his engine, he was acting without the scope of any duty he owed to his employer, and had any injury come to plaintiff on account of that act of the engineer itself, whether negligently done or not, the master would not be liable. If that were all there is of this case, it is plain the judgment would be contrary to law, and should be set aside. The action is not based on any such ground. It is sought to recover for a very different reason. It is because when plaintiff was on the engine, no matter how he got there, it was the duty of the engineer to put him off, and in doing so he was obliged to observe reasonable care. The rules of the company, in evidence, show it was unlawful for any one, other than certain employees, to ride upon the engine. Should any stranger get upon the engine, it would clearly be the duty of the engineer to put him off, and in doing so he would be acting within the general scope of his employment, and if, in the discharge of that duty, he negligently or wantonly injured such person, the master would be liable. In this case, it may be conceded plaintiff was wrongfully on the engine, whether he was there by the invitation of the engineer or by his own wrongful conduct, and it was the duty of the engineer to cause him to get off. At the time of the accident plaintiff was about seven years old, and of course was too young to observe much, if any, care for his personal safety.

It was the duty of the engineer to observe care, even if plaintiff was in the wrong in getting upon the engine. It was admitted by counsel at the trial, "the engineer has no right to throw a boy off or to kick him off." That concession is in harmony with the law that makes it his duty to observe reasonable care, under the circumstances, in putting a person off the engine, even when wrongfully there. The evidence tends to show, and it must be assumed such is the fact, that when the engine-driver saw the yard-master, he said to plaintiff, "Cheese it, — the old man is coming," and then told plaintiff to get off. The engine was then in motion, and the boy undertook to get off, as he was told to do, and in doing so was injured, as is alleged in the declaration. Conceding these to be the facts, it was negligent conduct in the engineer to direct a child only seven years old to get off the engine while in motion. It may be the engine-driver was guiltless of improper or negligent conduct in the matter; but the lower courts have found otherwise, and this court is prohibited from reviewing that finding, and it must consider the case as it comes before it.

The instructions given for plaintiff are not so variant from views here expressed as to make the giving of them any serious ground of error. The second and fourth requests of defendant, which the court refused to give, do not contain accurate expressions of the law applicable to the facts of the case, and the court very properly refused to give them. The other instructions asked were properly refused for the same reason. The doctrine applicable to "co-employees in the same line of employment," as stated in the seventh refused instruction, could have no appropriate application to the facts of the case, and was properly refused.

The judgment of the appellate court will be affirmed.

RAILROAD COMPANY IS ANSWERABLE FOR ACTS OF ITS SERVANTS IN COURSE OF THEIR EMPLOYMENT, whether abusing or rightfully pursuing the powers conferred on them, and whether acting within or in direct violation of their instructions: *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510.

PERSON RIDING IN DANGEROUS PLACE BY INVITATION OF SERVANT OF RAILROAD COMPANY IS ENTITLED TO SAME CARE as if he were in a proper place on a passenger train: *Magee v. Railroad Co.*, 92 Mo. 208; 1 Am. St. Rep. 706, and note 712; and see *International etc. R. R. Co. v. Cook*, 68 Tex. 713; 2 Am. St. Rep. 521, and note 524.

DUTY OF RAILROAD COMPANY TOWARDS ONE WHO UNDERTAKES to assist an employee of the company, at the request of the employee: See *Ky. Cent. R. R. Co. v. Gastineau*, 83 Ky. 119.

GERMANIA FIRE INSURANCE COMPANY v. HICK.

[125 ILLINOIS, 351.]

INSURANCE — WAIVER. — Though a policy of insurance specifies that it shall be void if the property insured is situate on leased ground, “unless specially agreed to in writing in or upon the policy,” the company cannot avoid the policy for a breach of that condition if its agent was aware that the property was on leased ground, and made out the application himself.

ESTOPPEL. — **INSURANCE COMPANY WHICH KNOWINGLY TAKES A PREMIUM FOR A POLICY UNDER CONDITIONS WHICH RENDER IT INVALID** is estopped from urging those conditions to release it from its contract.

INSURANCE. — **IF APPLICATION FOR INSURANCE IS MADE OUT BY AN AGENT OF THE INSURER, ACTING on his own knowledge,** the company ratifies his acts by granting the policy. If he was mistaken in the representations which he makes in the application, the company cannot insist upon it as a defense to a recovery.

COURT IS NOT BOUND TO HOLD AS LAW ALL LEGAL PROPOSITIONS SUBMITTED to it on trial of case without jury. It is sufficient if propositions submitted and held correct state every possible principle of law necessary to be considered in the case.

Barnum, Rubens, and Ames. for the appellant.

Carl Roedel, for the appellee.

SCOTT, J. This suit was brought in the circuit court of Galatin County by Sophia L. Hick, for the use of Thomas S. Ridgeway, against the Germania Fire Insurance Company. The declaration is an *assumpsit* on an insurance policy. The risk covered by the policy is a mill, with the plant connected therewith, situated on leased land. One of the conditions contained in the policy upon which the insurance contract would be void, “unless specially agreed to in writing in or upon the policy,” is, “the situation of an insured building on leased ground.” The only defense insisted upon is, that the fact the mill was situated on “leased ground” was not agreed to in writing in or on the policy covering the risk in this suit. There is no controversy made as to the fact the mill was situated on “leased ground,” nor is it pretended it was agreed to in writing, on the policy or otherwise, that such was the fact. Admitting these facts, as was done, plaintiff contended the agent of defendant, who made the application for insurance, knew the true title and situation of the property at the time he filled up the application, and it was as to such alleged knowledge of the agent issue was formed and the trial was had in the circuit court. No other point in the case seems to have been contested.

The record contains very clear and satisfactory evidence the agent did know, when he made the survey, and "answered the questions from his own knowledge," upon which the policy was written, that the mill property stood on "leased ground." He states so distinctly. But if it were a controverted question of fact, the finding of that fact by the appellate court, as did the trial court, would be conclusive upon this court. Assuming, then, as must be done, the agent of defendant, when he made what he called a "mill survey," and answered the questions of his own knowledge, without any inquiry of the assured or the party for whose benefit it was taken, knew the mill was situated on "leased ground," the law is for plaintiff, and defendant will be estopped to say the policy was void for that reason. An insurance company that knowingly takes a premium for a policy under conditions that would render it invalid will not be permitted to say it is not a binding contract for that reason. In all such cases the company will be regarded as having the same knowledge of the condition and situation of the property as possessed by the agent transacting the business for it. This view of the law has frequently received the sanction of this court in its previous decisions.

Atlantic Ins. Co. v. Wright, 22 Ill. 462, is a case quite analogous in its facts with the one now before this court, and is, therefore, an authority exactly in point. It was there said: "When the agent of the company undertook to make the survey, the applications and representations of the interest which the assured had in the property, and dispensed with any acts of the assured, and acted upon his own knowledge of the facts, the company ratified his acts by granting the policy. They are bound by his acts as their agent, and if he was mistaken in his representations to them of the ownership, they have no right to insist upon it as a defense to a recovery." The doctrine of this case was expressly approved in the subsequent case of *Andes Ins. Co. v. Fish*, 71 Id. 620, and its correctness is not now doubted.

By consent of parties, the case was tried by the court without the intervention of a jury. At the trial, defendant submitted six propositions, which the court was asked to hold as law applicable to the facts,—four of which the court held to be the law, and the other two (the fourth and fifth of the series) the court refused. That decision of the court is assigned for error. It matters little whether the propositions the court refused contain correct expressions of the law or not.

It is sufficient if it clearly appears that the propositions which the court held to be correct state every possible principle of law necessary to be considered in the decision of the case. Other propositions were wholly unnecessary, and the court was not bound to hold them to be the law. The same thing may be said of the proposition submitted by plaintiff, and which the court held to be correct, and which states the law with entire accuracy. It is certain, from the propositions which the court held, that the trial court understood and applied the law to the undisputed facts of the case precisely as this court had declared it to be by its previous decisions, and no mere slight error in holding or refusing other propositions will be regarded as sufficient ground for the reversal of the judgment.

The judgment of the appellate court will be affirmed.

INSURANCE COMPANY IS CHARGEABLE WITH KNOWLEDGE of every fact of which its general agent has knowledge: *Morrison v. Ins. Co.*, 69 Tex. 253; 5 Am. St. Rep. 63, and see note 70.

WAIVER BY INSURANCE COMPANY OF RIGHT TO INSIST UPON FORFEITURE by acceptance of premium when it is overdue: *Stylow v. Ins. Co.*, 69 Wis. 224; 2 Am. St. Rep. 738, and cases collected in note 740.

COUNTY OF COOK v. INDUSTRIAL SCHOOL FOR GIRLS.

[125 ILLINOIS, 540.]

SCHOOL IS SECTARIAN, AND COMES WITHIN CONSTITUTIONAL PROVISION THAT PUBLIC FUNDS SHALL NOT BE PAID OUT IN AID OF ANY SECTARIAN PURPOSE, or in aid of any school, etc., controlled by any church, where such school is a corporation organized as an industrial school for girls, but does not lease or own any building, although its charter contemplates that it shall have a *situs*, nor otherwise comply with the provisions of its act of incorporation, but places all girls nominally committed to it under the sole charge, care, and control of two institutions controlled by a church, where they are taught, maintained, and clothed by them alone, and in which institutions the inmates, although not obliged to receive instructions in the Romish faith, are yet taught no other faith or creed; and in such case a suit to recover for tuition and clothing furnished girls so placed cannot be maintained against the county.

TO SHOW THAT A SCHOOL IS CONTROLLED BY A CHURCH, EVIDENCE IS ADMISSIBLE that a judge of the superior court went to the place where an industrial school was alleged to be carried on, and was refused admittance unless he should first obtain a permit from a bishop or member of the Romish church, it appearing that such judge was authorized to commit girls to an industrial school, and that books containing copies of the warrants of commitments were required to be kept therein.

IMPEACHING COLLATERALLY THE ORGANIZATION OF DE FACTO CORPORATION — Quo Warranto. — If an industrial school that has availed itself of the provisions of the statute of Illinois — providing for the payment of moneys to such schools — is guilty of the misuse or non-use of its powers, and brings suit against a county upon a contract which the latter can lawfully make, perhaps a defense cannot be maintained solely upon the ground that the school is violating its charter; the proper proceeding to test that question may be *quo warranto*. But if the contract sued on is a contract to pay money out of the public funds in aid of a sectarian purpose, it is absolutely void under the constitution.

CONSTITUTION CONTROLS IN PREFERENCE TO STATUTE, where the statute directs a county board to pay money to an industrial school, and the constitution, in a self-executing provision, directs the county board not to pay money to such school when controlled by a church.

PRACTICE. — APPEAL LIES TO SUPREME COURT WHERE VALIDITY OF A STATUTE OR CONSTRUCTION OF THE CONSTITUTION IS INVOLVED, and motion to dismiss appeal for want of jurisdiction will be overruled where such question of proper construction is directly raised on face of record.

THE CONSTITUTION OF ILLINOIS DECLARES AGAINST THE USE OF PUBLIC FUNDS TO AID SECTARIAN SCHOOLS, independently of the question whether there is or is not a consideration furnished in return for the funds so used.

Francis Adams and E. R. Bliss, for the appellant.

Smith and Pence, and G. A. Koerner, for the appellee.

MAGRUDER, J. Under the provisions of the act of May 28, 1879, entitled "An act to aid industrial schools for girls," and of the act to amend sections 3, 5, and 9 thereof, passed on June 26, 1885, female infants to the number of about 189 were brought before the county court of Cook County at various times between April 1, 1886, and June 4, 1887, on charges of being dependent girls. The case of each girl was submitted to a jury, who found the facts set forth in the petition to be true, and the court thereupon entered an order in the case of each of such girls, that she "be committed to the Industrial School for Girls, at Chicago, in said county, to be in such school kept and maintained until she arrives at the age of eighteen years, unless sooner discharged therefrom according to law." These orders were executed, and the commitments were made in such manner as will hereafter appear. During the same period, various certificates were issued by the judge of said county court, certifying that certain bills for clothing, alleged to have been furnished by the Chicago Industrial School for Girls to the dependent girls so committed, were proper, and directing and authorizing the county treasurer of said county to pay the same.

This is an action of *assumpsit*, commenced in the circuit

court of Cook County on June 4, 1887, by the Chicago Industrial School for Girls against the county of Cook for the clothing so furnished to the said girls, and for their "tuition, maintenance, and care" during the period aforesaid, at the rate of ten dollars per month for each girl. The declaration contains only the common counts. The plea is the general issue, with a stipulation "that the defendant may set up any defense under the plea of the general issue, . . . and put in any evidence it might under any and all special pleas well pleaded, including that of *nul tiel corporation*."

The copy of the account sued upon shows that for the year from April 1, 1886, to April 1, 1887, there is claimed to be due for tuition, etc., \$15,664.24, and for clothing, \$2,345, making a total of \$18,009.24, which being reduced by a credit of \$2,109.16, leaves \$15,900.08 as the amount alleged to be due on April 1, 1887. Other bills were offered in evidence for "tuition, maintenance, and care," for the period from April 1, 1887, to June 3, 1887, inclusive, making "the total of all bills for tuition, maintenance, and clothing" \$19,583. A jury was waived by agreement, and the cause was tried before one of the judges of the circuit court, who rendered judgment in favor of the plaintiff for \$19,583, from which this appeal is prosecuted.

The board of commissioners of Cook County declined to pay these bills when presented, on the ground that they were forbidden to do so by section 3 of article 8 of the constitution of this state, which reads as follows: "Neither the general assembly, nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution controlled by any church or sectarian denomination whatever; nor shall any grant, or donation of land, money, or other personal property, ever be made by the state, or any such public corporation, to any church, or for any sectarian purpose."

It is claimed on the part of the county of Cook, the appellant herein, that the appellee, the Chicago Industrial School for Girls, never had any existence except on paper; that it never owned or leased any building or conducted any such school as was contemplated by its charter and by the act of May 28, 1879; that the corporation known as the Chicago

Industrial School for Girls was a mere tender to two institutions, called respectively the House of the Good Shepherd and the St. Joseph's Orphan Asylum; that all the commitments nominally made to appellee were, as matter of fact, made to these institutions; that appellee never furnished any of the clothing, nor performed any of the services, for which suit is brought, but that the girls, under the warrants for their commitment, were placed at once under the charge and care of these two institutions, and were taught, maintained, and clothed by them alone; that they alone have received all the money heretofore paid nominally to appellee by the county of Cook, and that they alone are to receive all the money that may be recovered in this suit; that the name of appellee is, in other words, nothing more than another name for these two institutions; that the House of the Good Shepherd and the St. Joseph's Orphan Asylum are Roman Catholic schools, under the control of the Roman Catholic Church; that, by paying the bills sued for, the county will be paying money out of the public funds in aid of a church or sectarian purpose, and to help support and sustain schools controlled by a church or sectarian denomination.

Upon the trial in the court below a stipulation was made between counsel as to some of the facts, and testimony was also introduced, on the one side to sustain, and on the other to controvert, the claim thus made by the county.

As bearing upon the questions suggested by the evidence, the defendant below submitted to the trial judge certain written propositions of law, as provided for by section 41 of the practice act. His refusal to hold as law the propositions so submitted, and also his refusal to admit certain testimony offered by the defendant, are assigned as errors.

The first question to be passed upon is, whether or not the payment of these bills by the appellant will be a violation of the provision of the constitution above quoted. The refused propositions hold the affirmative of this question, and in order to determine whether they are erroneous or not, it will be necessary to see what the evidence, upon which they are based, tends to prove.

1. Are the House of the Good Shepherd and the St. Joseph's Orphan Asylum schools controlled by a church or sectarian denomination? or do they have in view and exist for the accomplishment of sectarian purposes?

Upon this subject, counsel for appellee, in their brief, use

the following language: "The stipulation, which has been referred to, shows . . . that the House of the Good Shepherd is an incorporated body under the special act of March 7, 1867, and owns the land on which its building stands; that St. Joseph's Orphan Asylum is also incorporated; that those institutions are respectively under the control of orders of sisters of the Roman Catholic Church."

The record of the incorporation of the orphan asylum appears to have been lost. The charter of the House of the Good Shepherd, approved March 7, 1867, after reciting that the Sisters of the Good Shepherd in Chicago "are members of an order the object of which is to reform abandoned women," etc., enacts, that Adeline Noreau (known as Sister Mary of the Nativity) superior, Mary Kavanaugh (known as Sister Mary of St. Philomene) assistant, Catherine Riordan (known as Sister Mary of St. Joseph) counselor, and Clara Nonenkamp (known as Sister Mary of the Visitation) counselor, and their successors, etc., are constituted a body corporate by the name of the House of the Good Shepherd; and by that name shall have the right to carry on an institution at Chicago for the reformation of abandoned women; "to make such laws, rules, and regulations as may be necessary for the proper order, conduct, and control of said house; . . . to keep a school or academy, or engage in any other lawful . . . business for the purpose of maintaining said house."

The stipulation of counsel, which sets forth the admitted facts in the case, contains the following recitals: "That the House of the Good Shepherd has been maintained since its organization, and is now, for the purposes of its incorporation as defined by the act aforesaid; that the Sisters of the Good Shepherd, named in said act of March 7, 1867, and their successors in office, belong to one of the several orders of the Roman Catholic Church, under the general denomination of nuns; that upon their admission to said order they assumed certain vows, by which they are pledged to belief in the tenets and doctrines of the Roman Catholic Church, to the absolute exclusion of all other religious creeds, and also to yield implicit obedience to the mandates of the superior authorities of said order; that the management and control of said St. Joseph's Orphan Asylum is vested in another order of said church, known as the Sisters of Charity, whose relations to said church are similar to those of the Sisters of the Good Shepherd, and that since its organization said institution has been used for

the purposes of its incorporation, viz., as an asylum for orphans; that both of said institutions are in the possession of and under the absolute control and management of said two orders respectively."

Murray Nelson, a witness for the defendant, testifies that he was a member of the board of commissioners of Cook County from December, 1886, to December, 1887, and was chairman of the finance committee, and that he spent a day in the House of the Good Shepherd. He says: "There is no secret about the religious or sectarian character of the House of the Good Shepherd. The institution is a Roman Catholic institution on the face of it. . . . Everything indicated that it was a Roman Catholic institution. All the paraphernalia of the Church—pictures, graven images, candles, crucifixes, crosses—were met at every quarter, in every passage-way, in the school-room, on the desks, on the walls,—everywhere."

Frederick H. Wines, another witness for defendant, testifies that he is secretary of the state board of public charities, and as such visited the two institutions in question, and that he was in both of them "long enough to go all over them." He says: "Mary Cleary and Johanna Williams unquestionably had the charge or management of the House of the Good Shepherd. The lady who took me around was the lady superior, who was in command of everything and everybody in the place, and respected as such. Everybody rose when she came into the room. . . . Mary Cleary was the superior, and Johanna Williams—it seems to me it is Sister Mary of the Nativity they call it. Did you ascertain anything upon your visits there as to whether or not the institution known as the House of the Good Shepherd was controlled by any church or sect? It is controlled by a religious order of the church. Of what church? The Roman Catholic Church."

Thomas Brennan, a witness for plaintiff, testifies as follows: "What, if any, particular creed is taught in the House of the Good Shepherd? Catholic. . . . I am asking you . . . whether or not all the inmates are instructed in the Roman Catholic creed? No; there are some of them not instructed at all, because they do not oblige those that are not of their faith to receive instructions of that kind, nor require them to."

From the testimony of this witness it appears that the only creed taught is the Catholic creed. Those who may not be obliged to receive instruction in the Catholic faith are not instructed in any faith. No provision is made for instruction

in such creeds other than the Catholic, as may be preferred by any of the inmates.

It is admitted that the "Chicago Industrial School for Girls carries on all its operations through these institutions." The record shows the order of exercises, which children of a certain class, who have been committed to the industrial school, but are taught and cared for in the House of the Good Shepherd and the St. Joseph's Orphan Asylum, are required to observe on each day. Among these exercises, in the morning, are "morning prayers, 5:30 to 6; chapel exercises, 6 to 6:45; school, 8 to 12"; and in the evening, "night prayers, 8:20 to 8:40." As no other than the Roman Catholic religion is taught, the prayers and chapel exercises here referred to must be those prescribed by the Catholic Church.

That the institutions now under consideration conduct schools for the instruction of the children committed to their care is not only apparent from what has been said and from other circumstances disclosed by the evidence, but also from the very nature of the services for which this suit is brought. Nearly all the money claimed to be due is for tuition, care, and maintenance. The work of tuition was all performed by these institutions, as will be seen hereafter. The meaning of the word "tuition," as here used, is "instruction," or "the act or business of teaching the various branches of learning."

It follows from the foregoing statement of the evidence, that the House of the Good Shepherd and the St. Joseph's Orphan Asylum are "schools controlled by a church." Being such, they are necessarily sectarian in their character and in their objects. One of the definitions given by Webster of sectarianism is "adherence to a separate religious denomination."

In *State v. Hallock*, 16 Nev. 373, it was held that the Nevada Orphan Asylum was a sectarian institution, and that the payment of a claim made by it against the state would be a violation of the following provision in the state constitution: "No public funds of any kind or character whatever, state, county, or municipal, shall be used for sectarian purposes." The facts in that case will be found, on examination, to be similar to the facts in the case at bar. The court there use the following language: "It is admitted . . . that the St. Mary's School is a part or branch of the Nevada Orphan Asylum; that it is controlled exclusively by officers of the latter, who are Sisters of Charity, members of the Roman Catholic Church, and who cannot become sisters unless they are

members of that church. The petitioner is a branch of the 'mother house' at Emmetsburg, Maryland, and has to report to it. [Then follows a review of the testimony.] From all the preceding facts, it seems to us that the Nevada Orphan Asylum is a sectarian institution. . . . A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people. In the sense intended in the constitution, every sect of that character is sectarian, and all members thereof are sectarians. . . . Counsel lay great stress upon what are claimed to be the facts; that is to say, that Protestant children are taught only those things which are common to all Christian people, and that only the children of Catholic parents are taught the principles of the Catholic Church. In the first place, the facts are not so, and in the second place, if they were, the instruction given to the Catholic children would stamp the institution as sectarian. The facts are, that all exercises of a religious nature are of one kind, exercises appertaining to the Catholic Church, and they are regular, and form as much a part of the daily routine as does the study of geography or arithmetic. . . . It does not matter that Catholic parents desire their children taught the Catholic doctrines, or that Protestants desire theirs to be instructed in Protestantism. . . . It is what is taught, not who are instructed, that must determine this question. If the instruction is of a sectarian character, the school is sectarian. . . . It was intended that public funds should not be used, directly or indirectly, for the building up of any sect. And any instruction or exercises which in common schools would be of sectarian character are so at the St. Mary's School."

In this connection, it may be proper to notice one of the errors assigned on the ground of the exclusion of evidence. Defendant, for the purpose of showing that the Chicago Industrial School itself was controlled by the Catholic Church, offered to prove that one of the judges of the superior court of Cook County went to the House of the Good Shepherd and was refused admittance, and was told that "if he wished to be admitted, he must get a permit from the Roman Catholic bishop, or some gentleman member of the Catholic Church in good standing."

As we understand the record, counsel for the plaintiff below admitted the truth of the statement, that the occurrence, which

it was thus proposed to prove, actually took place, but objected to it "as immaterial." The objection was sustained, and defendant excepted. We think this ruling was erroneous. It is admitted that the Chicago Industrial School, if it had any existence at all except on paper, was carried on in the buildings and upon the premises of the two institutions already named. The amendatory act of June 26, 1885, provides that the petition to inquire into the dependency of a female infant may be presented to the county court, "or any court of record of said county." Therefore, a judge of the superior court had the power, under the law, to commit dependent girls to this industrial school when proper application should be made to his court. Moreover, section 6 of the act of May 28, 1879, provides that a duplicate copy of the warrant under which each girl is committed, and of the indorsements thereon, including the matron's receipt for the girl committed, shall "be recorded by her in a book kept for that purpose, and said book shall always be open to the inspection of any person." Hence the refusal to admit a judge of the superior court into the place where the industrial school was alleged to be carried on, and where the book containing copies of the warrants of commitment to it were required to be kept, unless he should first obtain a permit from a bishop or member of the Catholic Church, was a strong circumstance tending to show that the school in question was controlled by a church.

2. Will the payment of the bills sued for "help support or sustain" the House of the Good Shepherd and the St. Joseph's Orphan Asylum? or be in aid of their sectarian purposes? In other words, is the Chicago Industrial School merely another name for these two institutions?

The Chicago Industrial School for Girls was incorporated in November, 1885, under the act entitled "An act concerning corporations," approved April 18, 1872, and on November 24, 1885, obtained the written consent of the governor to avail itself of the provisions of the above-mentioned act of May 28, 1879, and of the amendments thereto. By the third section of its charter its management was vested in a board of nine directors, to be elected annually, and by the fourth section the following persons were selected as directors for the first year: Mary Cleary, Johanna Williams, Mary Kavanaugh, Margaret Cantwell, Anna Joice, Mary Morrissey, Johanna Brennan, Addie Williams, and Mary D. Jones. These same persons are also named in the charter as incorporators.

By the stipulation aforesaid, which is dated January 30, 1888, it is admitted that Mary Cleary, Johanna Williams, Mary Kavanaugh, Margaret Cantwell, Anna Joice, Mary Morrisey, and Johanna Brennan "were before and on the twenty-fourth day of November, 1885, and are now, members of said order of the Sisters of the Good Shepherd, and that, as members of such order, they perform certain duties in the matter of the care and custody of the inmates of the said House of the Good Shepherd in discipline and in moral, religious, and manual training." Addie Williams and Mary D. Jones were communicants of the Roman Catholic Church, but not connected with either of the orders mentioned. By an amendment of the by-laws passed on November 28, 1886, it was provided that the incorporate charter members should remain directors for life.

It thus appears that of the nine persons who were directors and incorporators of the Chicago Industrial School for Girls, seven were officers and managers of the House of the Good Shepherd, and continued so to be thereafter.

At a meeting of the charter members of the Chicago Industrial School for Girls, held on November 28, 1885, at which the archbishop of the Roman Catholic Church was elected chairman, and stated the object of the meeting to be "the election of officers in order to perfect the organization," Mary Cleary was elected president, Anna Joice vice-president, Johanna Williams recording secretary, and Mary Kavanaugh treasurer. Mary Cleary was the mother superior of the House of the Good Shepherd, Johanna Williams its matron and secretary, Anna Joice and Mary Kavanaugh among its subordinate officers, and the latter one of its original incorporators in 1867.

It thus appears that the officers of the House of the Good Shepherd were made officers of the Chicago Industrial School for Girls.

The meeting of November 28, 1885, at which the officers of the industrial school were elected, was held in the parlors of the House of the Good Shepherd, in the presence of its representatives and of representatives from St. Joseph's Orphan Asylum. The witness Thomas Brennan, who was also present at the meeting, testifies: "There was a general conversation then as regards the organization of the Industrial School for Girls, and it was discussed in various ways and manners how it should be conducted, but for the time being it was decided

that the House of the Good Shepherd and the orphan asylum should receive those girls from the Industrial School for Girls, and take care of them until such time as a proper building was erected."

Nothing further was done or said in relation to the erection of a building until May 28, 1887, a few days before this suit was begun, and after the county had refused to pay some of the bills presented, when a motion was made and seconded, at a meeting of the directors, for the selection of a building "for the domiciling of the children of the school." The meeting adjourned, "with the understanding that the members should meet at an early day to perfect plans to collect money for the erection of a future home for the children of the school."

As matter of fact, however, up to the date of the commencement of this suit the Chicago Industrial School for Girls has neither owned nor leased nor contracted for a building, nor has it owned or acquired any property of any kind.

Brenan further says: "The idea I got from the conversation then was, that those children, when committed by the court, were to be sent to these institutions, and they were to receive them and take care of them for the industrial school. . . . The industrial school girls are divided between the House of the Good Shepherd and the St. Joseph's Orphan Asylum; do not know how they are classified, or whether any distinction is made between them; . . . there is very little distinction made in taking care of the Chicago Industrial School children and the others. The treatment they receive is about the same. There are about 350 inmates of the House of the Good Shepherd; there are some who are called abandoned, and others who are not; they have separate play-grounds and separate class-rooms. Do I understand you to say that the inmates of the House of the Good Shepherd proper are kept separate from the Chicago Industrial School children? No, sir; he did not ask me that question; the children are classified; each class may contain children of both institutions."

The following is another portion of Brennan's evidence: "Where is the Chicago Industrial School for Girls? and where does the president reside? The children are kept in the House of the Good Shepherd. Where is the Chicago Industrial School for Girls? I answered that by telling you where they are kept. You say that you kept the children in the House of the Good Shepherd and the St. Joseph's Orphan Asylum? Yes, sir. I am now asking you where the Chicago Industrial School for

Girls is? I suppose, as far as that is concerned, it is there in those two institutions. Anywhere else that you know of? Not that I know of. Then the president of the Chicago Industrial School presides over its destinies at the House of the Good Shepherd? Yes, sir. . . . She was connected with the House of the Good Shepherd prior to the organization of the industrial school. . . . She had general management of the House of the Good Shepherd. What are her duties there now? I think about the same. You are acquainted with the recording secretary of the Chicago Industrial School, are you not? Yes, sir. . . . She was associated with the other sisters in the management of the House of the Good Shepherd prior to the organization of the Chicago Industrial School. I think she was in charge of certain classes, or assistant probably in charge of certain classes. What is the nature of her duties there now? I think about the same."

The witness Nelson says: "I deemed it necessary to find the industrial school, and went on a mission in that direction, first being told that it was at the House of the Good Shepherd and the St. Joseph's Orphan Asylum; I went to the House of the Good Shepherd, and spent a day looking for the industrial school, and finding no such school there, I objected to the payment of the bills. . . . I am clear in my recollection of that fact that I failed to find the industrial school. . . . I made a great many inquiries of the officers and persons in charge of the House of the Good Shepherd as regards the industrial school; I found nothing to indicate which were the children of the industrial school; they were mixed with the children of the House of the Good Shepherd in different departments."

The witness Wines says: "The mother superior volunteered the remark that none of the children committed by the county court were in the department for magdalens; all the other inmates were in the other two departments, and I do not think there was any distinction made; I saw nothing that indicated it."

Between December 11, 1885, and April 1, 1886, the sum of \$2,604.34 was claimed to be due to the Chicago Industrial School for Girls from the county of Cook, for tuition, etc., and clothing, which are admitted on the face of the bills to have been furnished entirely by the two Catholic institutions. The county paid the amount in the spring and summer of 1886. Johanna Williams acknowledged its receipt. Two hundred

and ninety dollars were paid for attorneys' fees. Of the remaining \$2,314.34, \$1,035.36 were paid to the St. Joseph's Orphan Asylum, and \$1,278.98 to the House of the Good Shepherd.

In the record of the proceedings of the Chicago Industrial School for Girls, the secretary sets forth itemized bills of amounts claimed to be due on account of tuition, clothing, etc., of girls committed to the school, for the quarterly periods succeeding April 1, 1886. As to amount due on July 1, 1886, the entry is as follows:—

"The bill, which amounts to \$3,449.64, is to be divided as follows:—

"Srs. of St. Joseph.....	\$1,757 33
"Srs. of the Good Shepherd.....	1,692 31

"Total.....	\$3,449 64"
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All the other bills are made out in the same way. The total of the amounts to be paid out of each bill to the House of the Good Shepherd and the St. Joseph's Orphan Asylum, and to the attorney who looks after the commitments, equals in every case the amount of the bill presented to the county. The industrial school as such gets nothing.

In the stipulation of counsel as to facts, it is admitted "that said moneys so received by the House of the Good Shepherd and St. Joseph's Orphan Asylum [the \$2,314.34 above named] were by such institutions respectively mingled with and used with other funds belonging to them, and under the direction of the managing officers or persons in control thereof."

In the stipulation it is furthermore admitted that the girls committed by the county court from April 1, 1886, to June 4, 1887, and for whose tuition and clothing this suit is brought, "were, for the times charged, respectively in either the building belonging to the House of the Good Shepherd or that belonging to St. Joseph's Orphan Asylum, and were supported and clothed by those institutions respectively, together with all the other inmates thereof, out of the funds of said institutions, of which the moneys paid by the county were a portion, and to which funds the moneys to be received in this suit are to be contributed."

It is further admitted that about seventy-three girls, who were committed to the Chicago Industrial School for Girls by the county court, were already in the House of the Good Shepherd and the St. Joseph's Orphan Asylum at the times

of such commitments. In other words, being already inmates of those institutions, they were taken to the county court and adjudged to be dependent girls, and at once returned to those institutions, and thereafter the county was charged with ten dollars per month for the tuition of each of them, and fifteen dollars, or twenty dollars, or twenty-five dollars for clothing for each of them. We so understand the following clause in the stipulation: "That at the times of committal of the following named girls—that is to say, Katie Boyle (and seventy-two others whose names appear on stipulation)—by the county court to the Chicago Industrial School, they had been and were under the charge of the House of the Good Shepherd, or St. Joseph's Orphan Asylum, having been received into one of those institutions prior to the times of such committal to the Chicago Industrial School for Girls." It is also shown by the evidence that nineteen other girls, who had been fined by police justices and sent to the House of the Good Shepherd on account of such fines, were declared dependent by the county court under the industrial school act, and returned to the House of the Good Shepherd under the commitments provided for in that act. That is to say, being already in that institution by reason of the fines imposed upon them, they were recommitted to its walls because adjudged to be dependent girls.

From this review of the evidence, we are forced to the conclusion that the payment by the county of the money sought to be recovered in this suit will be a payment in support of schools controlled by a church, and in aid of a sectarian purpose. Even if this conclusion be too broadly stated, there is still another view which brings the facts of the case within the terms of section 3. That section forbids any payment "in aid of any church." The two institutions in question are admitted to be under the control of two orders of the Roman Catholic Church. As we understand it, these orders are a part of the machinery of that church. Therefore, what is paid to aid them is paid in aid of a church.

The same conclusion follows from an examination of the act of May 28, 1879, and an application of its various provisions to the peculiar circumstances of this case.

The Chicago Industrial School for Girls, as it appears in the record before us, is not such an institution as is entitled to avail itself of those provisions. It has never established, maintained, or carried on an industrial school for girls, as

contemplated by the first section of the act. It has never provided a home and proper training-school for the girls committed to its charge, as required by the second section. It was not the intention of the act that the duties required of the schools therein mentioned should be performed by other institutions not organized as industrial schools. Its design was that each industrial school should maintain a home of its own, and superintend the training of its own scholars. The eleventh section is the only one which has reference to the care of any of the girls by outside parties. That section provides for placing an inmate in the home of a good citizen, or for her adoption by a person of good character, or for binding her to a reputable person as an apprentice or a servant, subject to the right of the "officers and trustees" of the school to see that she is properly treated, and to take her back into their own custody in case of her ill treatment. The specification in this way of a particular mode for placing the inmates under the control of outside parties excludes the idea that it was the intention of the act to permit any other mode.

The schools therein named have no power to relinquish the care and guardianship, which they are themselves required to exercise, or to intrust to others the instruction and training which they are themselves required to give. The word "provide," as used in the act, does not mean that the education of the pupils can be surrendered to another corporation, but that the industrial school shall adopt all proper means for accomplishing the object of its organization, under the direction of its own officers, and upon premises in its own control. This sufficiently appears from the language of the act.

The fourth section provides for the entry of an order by the judge, "that such infant be committed to an industrial school, etc., . . . to be in such school kept and maintained." These words imply that the school must be a place, and must be carried on in a building. It is not sufficient that it have a charter and a formal organization. A person cannot be kept and maintained in a mere corporation which has no *situs*,—no habitation,—which is nothing more than a mere corporate entity. The appellee never had a building in which such infants could be kept and maintained. They were kept and maintained in the two institutions already mentioned.

By the sixth section, the warrant directs the person designated for that purpose by the judge to take the dependent girl "and convey her to the — Industrial School for Girls,"

etc. In the case at bar the warrants gave directions to convey to the Chicago Industrial School for Girls. There was no such school. The girls were conveyed to the house and asylum aforesaid. The seventh section provides that "upon receiving the dependent girl, the matron of the school shall indorse upon the warrant" a receipt for the girl named therein. The receipts upon the warrants in this case are signed, "Johanna Williams, matron." The proof shows that this lady was the matron and secretary of the House of the Good Shepherd. The records of the proceedings of the Chicago Industrial School for Girls do not show that she was elected to any other position in the latter corporation than that of recording secretary. In the stipulation, however, she is spoken of, in another connection, as "the recording secretary and matron of the plaintiff."

The eighth section prescribes "the fees for conveying a dependent girl to an industrial school for girls." The ninth makes it the duty of the judge to see that every girl committed "shall, at the time she is conveyed to the school, be furnished" with certain clothing. The fourteenth provides for the same visitation, inspection, and supervision by the board of state commissioners of public charities "as the charitable and penal institutions of the state." Such commissioners are required to inquire and examine into "the condition of the buildings, grounds, and other property connected therewith": Hurd's Rev. Stats. 1885, p. 200. All these expressions, and others that might be mentioned, show the meaning of the law to be, that these industrial schools must be conducted in buildings or on premises in their own possession and under their own control.

The tenth section of the act requires that "the officers and trustees of any industrial school for girls in this state shall receive into such school all girls committed thereto under the provisions of this act, and shall have the exclusive custody, care, and guardianship of such girls." Such custody, care, and guardianship cannot be exclusive if they are confided to another corporation, or exercised in conjunction with another corporation. In the present case the girls committed to the Chicago Industrial School for Girls were not only taken to the house and asylum above mentioned, but were mingled with the other inmates of those institutions, and placed in the same classes with them, except that the abandoned girls were kept separate from the rest. By the tenth section, also, the officers and trustees of the industrial school, and no other per-

sons, are required to provide for the support and comfort of their inmates, and "to instruct them in such branches of useful knowledge as may be suited," etc., and to prescribe the tasks necessary for "their education and training." These are duties which cannot be delegated under the terms of the act in question. The corporations charged with their performance are supposed to be peculiarly fitted therefor. It is for this reason that only those corporations which obtain the consent of the governor can avail themselves of the provisions of the act.

Even if the Chicago Industrial School for Girls had the power to make a contract with the two institutions in question for taking care of the dependent girls, and furnishing them with a home and with instruction and training and with necessary clothing, yet there is nothing in the record to show that there was any such contract, either express or implied. On the contrary, the Chicago Industrial School for Girls merely stood for those institutions, and was nothing more than another name for them. Its officers were their officers. Its premises were their premises. Its training was their training. If money was paid to it, such money went to them. If girls were committed to it, such girls were taken to their buildings. If there was a receipt for a girl committed to it, or for clothing furnished by it, such receipt was signed by their matron. There are in the record about 122 bills for clothing furnished, made out against the county of Cook in the name of the Chicago Industrial School for Girls, each for the articles of clothing mentioned in section 9 of the industrial school act, and each signed by "Johanna Williams, matron." Each bears a date later by a month or more than the date of the commitment therein mentioned. Some of the bills are for fifteen dollars each, some for twenty dollars each, and some for twenty-five dollars each. Each has attached to it a certificate of the county judge, certifying "that the above bill of expense for clothing furnished by the Chicago Industrial School for Girls to —, a dependent girl under — years of age, committed to said school, is proper, and the county treasurer of said county is hereby directed and authorized to pay the same." And yet it is admitted in the stipulation above quoted that the 122 girls whose names appear in these bills "were supported and clothed by those institutions," that is to say, by the House of the Good Shepherd and the St. Joseph's Orphan Asylum.

It otherwise appears in the record that all the clothing specified in these bills was furnished by those two institutions.

We are therefore of the opinion that the trial judge erred in refusing to hold as law the written propositions, which maintain that, under the facts of this case, the payment of the money sued for would be a violation of section 3 of article 8 of the constitution. A constitutional mandate cannot be circumvented by indirect methods. Under our form of government, church and state are not and never can be united. The former must pursue its mission without aid from the latter.

It is recorded in the national constitution that "Congress shall make no law respecting an establishment of religion." An eminent law writer says: "Those things which are not lawful under any of the American constitutions may be stated thus: . . . 2. Compulsory support, by taxation or otherwise, of religious instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary": Cooley's Constitutional Limitations, 5th ed., 580. The women whose names are written in this record are animated by the purest motives. They are engaged in the best and holiest of all works,—that of reforming the wicked and caring for the unfortunate. We agree with counsel for appellee that they do their work faithfully and well. It is so shown by the proofs. But it is none the less true that, by the command of the constitution, no county "shall ever . . . pay, from any public fund whatever, anything . . . to help support or sustain any school . . . controlled by any church." It is not for us to discuss the wisdom or unwisdom of this prohibition. There it is, couched in terms so emphatic that it cannot fail to challenge attention. Any scheme, even though hallowed by the blessing of the church, that surges against the will of the people as crystallized into their organic law, must break in pieces, as breaks the foam of the sea against the rock on the shore.

It is objected, however, that the defense set up by the county in the case at bar cannot be made in an action of this kind. The objection is, that the appellee was a corporation *de facto*; that the dependent girls were committed to it; that, as a result of such commitments, they were taught, cared for, and clothed; that a corporate body *de facto* cannot, in the language of counsel, "have its organization questioned col-

laterally in an action of this character, and that, if its organization is defective, or if it fails to comply with its charter requirements, writs of *quo warranto* or *scire facias* may be directed against it to prevent its further action." We do not think the objection is well taken.

The county is required to make payment for the tuition, etc., of dependent girls, "to the industrial school for girls to which they may be committed." It is not bound to pay an industrial school to which they are not committed. It is not sufficient that the county judge orders them to be committed. They must be actually taken to the school and placed within its building. Has not the county board the right to inquire whether the girls have been committed to such a school or not? The board is required to pay ten dollars per month for each girl, "upon the proper officer rendering proper accounts therefor quarterly." Has not the board the power, in order to determine whether the accounts are "proper" or not, to examine and see whether tuition has been furnished for the number of months mentioned in the accounts? The order of the judge directs that the girl shall be "kept and maintained" in the school until she is eighteen years old, "unless sooner discharged," etc. The board can certainly inquire into the condition of affairs, to ascertain whether or not the girl has been kept and maintained, as ordered by the court, and how long she was so kept and maintained before her discharge.

If the board, upon examination, finds that the girls have never been taken to any industrial school for girls, but that they have been taken to and kept and maintained in two institutions that are not industrial schools for girls, and to whose care and keeping no industrial school for girls has any power to transfer them, then it becomes a serious question whether there is any authority for allowing the accounts rendered and ordering them paid out of the county treasury. The proceeding is statutory, and the statute must be strictly adhered to. The case is not one of an ordinary debt due to an ordinary corporation. The statute itself defines the debt to be paid, and who is to pay it, and to whom it is to be paid.

But, independently of these considerations, the defense of the county does not rest altogether upon the want of power in the appellee to turn over the performance of its duties to two sectarian institutions, but upon the want of power in appellant to pay money to those institutions. It is not contended

by the county that the organization of appellee was defective; on the contrary, it seems, upon the face of the papers, to have been organized in strict conformity to the statutory requirements. The constitution forbids the county to pay; the defense is grounded more upon this constitutional prohibition, as controlling the action of the defendant in the suit, than upon such want of power or abuse of power as affects the position of the plaintiff in the suit.

If the views already expressed are correct, a payment of this money by the county will be a violation of the constitution. Will there be any less a violation of the constitution because hereafter a *quo warranto* proceeding is instituted against appellee resulting in an ouster from all its franchises? Suppose that a corporation organized for a lawful purpose maintains and operates a gambling institution, and brings suit upon a note payable to its own order and given to it for a lawful debt. The maker of the note cannot defend, on the ground that the plaintiff is perverting its powers by running a gambling establishment. That matter must be inquired into by the writ of *quo warranto* or *scire facias*. But if the note in question had been given for a gambling debt, that fact could be set up as a defense, because the statute makes such a note absolutely void; and the defense would be none the less good because there was also a proper case for a *quo warranto* proceeding on account of the abuse or misuse of corporate powers.

So if an industrial school that has availed itself of the provisions of the act is guilty of the misuse or non-use of its powers, and brings suit against a county upon a contract which the latter can lawfully make, perhaps a defense cannot be maintained solely upon the ground that the school is violating its charter; the proper proceeding to test that question may be *quo warranto*. But if the contract sued upon is a contract by a county to pay money out of the public funds in aid of a sectarian purpose, it is absolutely void, as the constitutional prohibition against paying money is equally a prohibition against a contract to pay money. Can it be doubted that the void character of such a contract can be set up as a defense to the suit, notwithstanding the fact that good grounds may also exist for a *quo warranto* proceeding? If, in the case at bar, there is any contract, express or implied, or arising out of the provisions of the act of May 28, 1879, between Cook County and these two sectarian institutions operating under

appellee's name, then such contract is void, because the consideration on which it is based is forbidden by the constitution as being against public policy. But is there any contract with the county to pay the money sued for in this action?

The act of May 28, 1879, provides that, upon petition filed, a jury may be called to determine whether a female infant is a dependent girl, and if there is a verdict that she is, the county judge may order her to be committed to an industrial school for girls, etc. But the act nowhere provides that the county may appear in the proceeding, nor does it seem to contemplate that the county has any right to appear. The judgments of commitment in this record recite that the county of Cook was present by its attorney. But the presence of a county attorney is not shown anywhere in the record except by these recitals in the judgments.

Section 9 as amended says that "for the tuition, maintenance, and care of dependent girls, the county from which they are sent shall pay to the industrial school for girls, to which they may be committed, for each dependent girl under eighteen years of age, the sum of ten dollars per month. And upon the proper officer rendering the proper accounts therefor quarterly, the county board shall allow and order the same paid out of the county treasury." As the county is not allowed to appear in the proceedings to commit the dependent girls, it has no opportunity to contest these bills for tuition except in suits brought for their collection. The adjudication of the county court involves no other question than that the girl is dependent, and should be committed to a certain school. The judgment of that court does not determine that the county must pay. The obligation of the county to pay is derived from the language of the law itself.

If, on the one side, a statute directs the county board to pay money to a school, which appears, not on the face of the statute, but from outside proof, to be controlled by a church, and if, on the other side, the constitution, in a self-executing provision, directs the county board not to pay money to such a school, which direction is to be followed? We answer unhesitatingly, the latter. When the constitution says: "You must not pay," it must be obeyed in preference to a statute which says, "You must pay." And this is true not only where the statute on its face is in conflict with the constitutional provision, but also in a case where an attempt to apply the statute to a given state of facts gives rise to a violation of such

provision. We are therefore of the opinion that, upon the facts of this case, the act of May 28, 1879, imposes no obligation upon the county of Cook which is superior to its obligation to obey section 3 of article 8 of the constitution.

The second question presented for our consideration relates to the jurisdiction of this court, and arises upon a motion made by the appellee to dismiss the appeal for want of jurisdiction, which motion was reserved until the hearing of the cause.

The eighty-eighth section of the practice act provides that "appeals from and writs of error to circuit courts, etc., . . . in all . . . cases in which a franchise or freehold, or the validity of a statute, or construction of the constitution, is involved, shall be taken directly to the supreme court."

And appeal may lie to this court where the validity of a statute is involved, and an appeal may also lie where the construction of the constitution is involved. A statute may be invalid from the uncertainty of its provisions, but ordinarily it is valid if it conforms to the constitution, and invalid if it does not conform to the constitution. It is manifest that the construction of the constitution may be involved in the question of the validity of a statute. A provision of the constitution may be of such doubtful import that a statute would be in conflict with it if given one construction, and not in conflict with it if given another construction.

The question of the construction of a constitutional provision usually arises out of a comparison of such provision with the terms of a statute supposed to be in conflict with it. But there are constitutional provisions which are self-executing, and require no legislation to make them effectual: *East St. Louis v. People ex rel. Gundlach*, 124 Ill. 655. Section 3 of article 8, as above quoted, is one of those prohibitory clauses which execute themselves: *Law v. People*, 87 Id. 385. It is clear that a question of the construction of such a self-executing clause will generally arise when it is applied to a given state of facts. If the meaning of the prohibition contained in such a clause is perfectly plain, there is nothing to construe. But if there is a doubt as to the meaning of any word or phrase when applied to the proven facts, then a case for construction has arisen.

One of the propositions refused by the court below attempts to define what is a "sectarian purpose," as those words are used in section 3 of article 8. It collates certain facts as above

narrated, and then states that if the court finds these facts to be established by the evidence, "then the court finds, as a matter of law, that the payment of the account claimed would be in aid of a sectarian purpose," etc. One state of facts might reveal a sectarian purpose, and another state of facts might not reveal a sectarian purpose. When a proposition presents the hypothesis that certain proven circumstances constitute and make up a sectarian purpose, then there is involved a construction of the word "sectarian" as used in the constitution.

This precise point was considered in *State of Nevada v. Hallock*, *supra*. In regard to the provision of the Nevada constitution, which has already been set forth, the court in that case say: "The amendment to the constitution above quoted was intended to be self-acting. It requires no legislation to become operative. . . . The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. . . . In this case there is, in one sense, no ambiguity. It is plain that no public funds can be used for sectarian purposes; but it is not plain, from the amendment itself, what the people meant by the words 'sectarian purposes.'" The learned chief justice then proceeds to examine the legislation of the state, and the facts of the case in hand, to determine the meaning of the words.

Another proposition refused by the trial court presents the question whether section 3 of article 8 shall be construed to mean that the county shall not pay anything directly to the school controlled by a church, or whether it shall be construed to mean also that such payment must not be made indirectly to another corporation for the benefit of the school so controlled by a church. To determine whether or not the indirect method already explained, by which money is to be taken out of the county treasury in the name of the Chicago Industrial School for Girls, and passed over to the House of the Good Shepherd and the St. Joseph's Orphan Asylum, comes within the prohibition of section 3, involves an interpretation of the meaning of that section, and, by consequence, a construction of the constitution.

But the refused propositions also present a definition of what is meant in section 3 by a payment "in aid." It is strenuously contended by counsel that section 3 was only intended to prohibit gifts or donations, and that it refers to "state support, gifts by way of aid," and "appropriations to be used by

managers of religious institutions without restraint or liability to account." The theory seems to be, that even if the two institutions are controlled by a church, and are to be the recipients of all the money paid to appellee, yet neither they nor their purposes are aided by such payment, provided only there is a consideration for the money paid. It is said that these institutions furnish tuition and clothing in return for the money received by them, and that as they earn what they get, and are not the recipients of any gift or donation, nothing is paid in their "aid," "or to help support or sustain" them. The refused propositions assert the contrary of the view thus contended for. The determination of their correctness or incorrectness requires an interpretation of the language of section 3, and therefore necessarily involves a "construction of the constitution."

The second clause of section 3 provides that no grant or donation of land, money, or other personal property shall ever be made to any church or for any sectarian purpose by the state, that is, the general assembly, or any such public corporation, that is, any county, city, town, township, or school district, etc. The first clause says that neither the state nor any such public corporation shall ever make any appropriation or pay from any public fund whatever anything in aid of any church or sectarian purpose. Evidently the second clause was intended to prohibit something different from the first clause. The second prohibits grants and donations, the first, appropriations and payments "in aid." If the appropriations and payments mentioned in the first clause mean simply "donations," and nothing more, then it was surplusage to add the second clause to the section. Upon the plainest principles of construction, the first clause has reference to a different kind of aid from that to be derived from donations. Its language is comprehensive enough to embrace all appropriations and payments, whether based on a consideration or not.

It cannot be said that a contribution is no aid to an institution because such contribution is made in return for services rendered or work done. A school is aided by the patronage of its pupils, even if they do pay for their tuition. Because the customers of a merchant pay for their goods, it is none the less true that his business is aided by their custom. The act under discussion is entitled "An act to aid industrial schools for girls." If the payment by the county of ten dollars per month on account of each dependent girl committed to such a

school is no aid to the school simply because "tuition, maintenance, and care" are furnished in return for such payment, then the act is not properly entitled.

The doctrine here contended for is an exceedingly dangerous one. In *County of McLean v. Humphreys*, 104 Ill. 378, it is intimated by this court that the state is under obligations to protect and educate such classes of female infants as were declared to be dependent girls by section 3 of the act of May 28, 1879, as that section stood before it was amended on June 26, 1885. Under this view, the industrial schools which teach and care for such girls are performing, as substitutes for the state, a duty which the state itself is bound to perform. If they are entitled to be paid out of the public funds, even though they are under the control of sectarian denominations, simply because they relieve the state of a burden which it would otherwise be itself required to bear, then there is nothing to prevent all public education from becoming subjected, by hasty and unwise legislation, to sectarian influences. By section 1 of article 8 of the constitution it is made the duty of the state to provide a thorough and efficient system of free schools. If statutes are passed, under which the management of these schools shall get into the hands of sectarian institutions, then, under the theory contended for, the prohibition of the constitution will be powerless to prevent the money of the tax-payers from being used to support such institutions, inasmuch as they will render a service to the state by performing for it its duty of educating the children of the people. It is an untenable position, that public funds may be paid out to help support sectarian schools, provided only such schools shall render a *quid pro quo* for the payments made to them. The constitution declares against the use of public funds to aid sectarian schools, independently of the question whether there is or is not a consideration furnished in return for the funds so used.

There is nothing in the doctrine here announced which conflicts with the case of *Millard v. Board of Education*, 121 Ill. 297. There the proceeding was by an individual tax-payer against a board of education, and a majority of the court sustained the act of the board, which had no school-house, in temporarily leasing the basement of a Catholic church for the purpose of holding one of the public schools therein. But the board did not part with its control of the school. The scholars were taught by teachers whom the board appointed, and under a system of instruction which the board prescribed.

Nor do the reasons here given for sustaining the jurisdiction of the court in this case conflict with the other case of *Millard v. Board of Education*, 116 Ill. 23. There the opinion expressly states that no question of the validity of a statute or of the construction of the constitution was raised. But here the question of the proper construction of a constitutional provision is directly raised upon the face of the record.

For the reasons thus stated, the motion to dismiss the appeal for want of jurisdiction is overruled.

Counsel for appellant has called our attention to the changes made in section 3 of the act of May 28, 1879, by the amendments to that section passed in June, 1885. By the latter, every female infant shall be considered a dependent girl who shall have no permanent place of abode, or who shall not have proper parental care or guardianship, or who shall not have sufficient means of subsistence, and if the parent or guardian of the girl is fit to have the custody of her, the petition is only required to state that "the father, mother, or guardian consents to the girl being found dependent." These are, indeed, extraordinary provisions. They are not found in the original act. They seem almost to lay the foundation for the establishment of paternal government. They appear to open the way for many parents to escape their obligations to support their children. If the counties are compelled to take care of all the children whose support may be forced upon them under these broad provisions, there is danger that taxation will ere long become so burdensome as to amount almost to the confiscation of the property of the tax-payer.

But upon the question as to whether these provisions are constitutional or not, the argument of counsel is not full enough to sufficiently advise us, and we have no time at present to make original investigations. We therefore pass no opinion upon their constitutionality.

The judgment of the circuit court is reversed.

WHAT CONSTITUTES A SECTARIAN INSTITUTION OR SCHOOL. — Although there is a dearth of cases wherein the question of what constitutes a sectarian school or institution is directly adjudicated, yet there are cases wherein the principle which is at the foundation of constitutional provisions similar to that of Illinois is considered, and the reasoning of those cases discloses the reason of the existence of the constitutional provisions in question, and necessarily aids in construing them. In Massachusetts, the supreme court declares that "the power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the state, and to provide for the public welfare. To justify any exercise of

of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is in its essential character a private and not a public object. . . . The incidental advantage to the public or to the state which results from the promotion of private interests and the prosperity of private enterprises or business does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary": *Lowell v. Boston*, 111 Mass. 454, 460; 15 Am. Rep. 39. In *Holt v. Antrim*, N. H. (not yet reported), the question arose whether a private educational institution was of a sufficiently public nature to warrant the levy of a tax for building a school-house to be leased to such institution, and the court said: "A tax raised for a free public school and a free public school-house is raised for a public purpose, and the purpose is not made private by a mere exaction of tuition." But the government may not, by taxation or otherwise, compel the support of religious instruction: *Cooley on Constitutional Limitations*, 4th ed., 584; *Cooley on Taxation*, 2d ed., 118. In *Nichols v. School Directors*, 93 Ill. 61, 34 Am. Rep. 160, it was decided that a statute authorizing school directors to grant the temporary use of public school-houses, when not occupied by schools, for religious, literary, and other meetings, and for evening and Sunday schools, was not unconstitutional, and did not come within that provision of the constitution which prohibited the grant or donation of land by the state, or the appropriation of public moneys or personal property, to sectarian purposes: See also *Millard v. Board of Education*, 121 Ill. 297; *Davis v. Boget*, 50 Iowa, 11. But examine *Dorton v. Hearn*, 67 Mo. 301; *Seofield v. School District*, 27 Conn. 499; *Spencer v. School District*, 15 Kan. 259; 22 Am. Rep. 268; and where the right of a school board to pass resolutions prohibiting reading the Bible in the public schools was before the Ohio supreme court, and it was urged that such act came within the provisions of the constitution guaranteeing religious liberty, and also within the provision that no religious or other sect should have the exclusive right to control any part of the school funds of that state, the court held that it was competent for the board to exclude reading the Bible in such schools: *Board of Education of Cincinnati v. Minor*, 23 Ohio St. 211; 13 Am. Rep. 233; but see *Spiller v. Inhabitants of Woburn*, 12 Allen, 127; *Moore v. Monroe*, 64 Iowa, 367; *Donahoe v. Richards*, 38 Me. 379; 61 Am. Dec. 379; in which two latter cases, although no other than the constitutional provision relative to religious liberty was urged, yet it was decided that such use of the Bible was not a subordination or preference of any sect or denomination to another. So although it is not directly adjudicated what is "sectarian" in the case of *Millard v. Board of Education*, 121 Ill. 297, 302, yet the facts that certain instruction of a Romish character was daily had, and that when the public school closed at noon each day the "angelus" prayer was said by pupils and teachers, were important ones in the case, and the court argues: "It is nowhere claimed in the bill that this prayer is required by the board or any rule of the school. . . . Had the board of education required any particular religious doctrine to be taught in the public schools, or established any religious exercises sectarian in character, and complainant's children were required to receive such religious instruction in the school, and conform to the sectarian exercises established, he might have good ground of complaint, as our public schools are established for the purpose of education. The free schools are institutions provided where all children of the state may receive

a good common-school education. The schools have not been established to aid any sectarian denomination, or assist in disseminating any sectarian doctrine, and no board of education or school directors have any authority to use the public funds for such purpose." Under a constitutional provision in New York that the common-school fund should be kept inviolate, it was held that the Roman Catholic Orphan Asylum Societies of Brooklyn were not common schools, and entitled to no part of the fund; that common schools "have been kept and ought to be kept free from everything savoring of sectarian influence or control": *People v. Board of Education of Brooklyn*, 13 Barb. 400, 411. And in Mississippi, where the constitution provides that "no religious sect or sects shall ever control any part of the school or university funds," it was decided that an act is unconstitutional under which a pupil of a private school, which receives pay for tuition, is entitled to a *pro rata* share of the school fund, where such school is not required by law "to be free from sectarian control in religious matters": *Otken v. Lamkin*, 56 Miss. 758, 764.

In *State v. Hallock*, 16 Nev. 373, 385, et seq., cited in the principal case, the court considered it necessary to examine the history of that state in relation to appropriations, as shown by the statutes and legislative journals, for the purpose of ascertaining what the people meant by the words "sectarian purpose," as used in the constitution, and determines that the words were used "in the popular sense," and that "a religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party by holding sentiments or doctrines different from those of other sects or people. In the sense intended in the constitution, every sect of that character is sectarian, and all members thereof are sectarians. The framers of the constitution undoubtedly considered the Roman Catholic a sectarian church. The people understood it in the same sense when they ratified it. . . . It does not matter that Catholic parents desire their children taught the Catholic doctrines, or that Protestants desire theirs to be instructed in Protestantism. The constitution prohibits the use of any of the public funds for such purposes, whether parents wish it or not. . . . It is what is taught, not who are instructed, that must determine this question. If the instruction is of a sectarian character, the school is sectarian. A church is as much sectarian if every person in attendance is a communicant as it would be if a part were of one belief and the balance of another." And it was said in *Hale v. Everett*, 53 N. H. 1, 81, "that if a society of one religious sect or denomination becomes incorporated with a strict denominational name descriptive of the fundamental doctrines of the sect to which it belongs, it will be presumed that it was constituted for the purpose of advancing the vital doctrines of such sect or denomination." And again: "Difference in creed or belief of the Christian doctrines makes the different Christian sects." And the distinction is also made in that case between Protestants and Roman Catholics. Other sects are also defined and distinguished, the name being held to indicate or describe the sect. "Sectarian" is defined in Stormouth's Dictionary as "pertaining to or peculiar to a sect." And this is substantially the same definition as that given by Webster in his dictionary, and which is adopted in *State v. Hallock*, *supra*, with the addition that Webster adds the words "bigotedly attached to the tenets and interests of a denomination." When the will of Stephen Girard came up for construction in the case of *Vidal v. Girard's Ex'rs*, 2 How. 127, the objection was raised that the bequest was void because of the restrictive clause therein contained that no ecclesiastic of any sect should hold or exercise any station or duty in the college, or even

visit the same, the testator's reason being, that because of the multitude of sects, and the diversity of opinion among them, he desired to keep the tender minds of orphans intended to be benefited by the bequest "free from the excitement which clashing doctrines and sectarian controversy are so apt to produce." And the court argues that the exclusion of sectarian teaching was not an exclusion of the teachings of Christianity, and says: "Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college?—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated. What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers?" And adds that "all that we can gather from the language is, that" the testator "desired to exclude sectarians and sectarianism from the college." And although the word "sectarian" in this connection is not specifically defined, yet the language of the decision seems to directly indicate that the generally accepted definition of the term, viz., the teachings or tenets of some particular form of the faith as adopted by the different sects is the one intended. The presumption also exists, in construing a word found in a section of the constitution, that such word is used with the meaning ordinarily attached thereto: *Weill v. Kenfield*, 54 Cal. 111, 113; *Hawkins v. Carrol Co.*, 50 Miss. 735; *Manley v. State*, 7 Md. 135; *People v. Dean*, 14 Mich. 406; and where the words employed are of common use, they are to be taken in their plain and ordinary sense: *State ex rel. Roberts v. Weston*, 4 Neb. 216; words in constitutions must also be construed as the people construed them at the time of their adoption: *Bay City v. State Treasurer*, 23 Mich. 499.

CONSTITUTIONAL PROVISIONS.—The constitutions of twenty-three other states, in addition to that of Illinois, contain provisions prohibiting the payment of moneys, or any appropriation or grant for the support, benefit, or in aid of sectarian schools, etc., as follows: Alabama: "Any sectarian or denominational school": Const. 1875; Code 1886, art. 13, sec. 8; California, same as Alabama: Const. 1873; Deering's Codes, vol. 1, art. 9, sec. 8; or, "In aid of any religious sect, church, creed, or sectarian purpose," or to help "support or sustain any school . . . controlled by any religious creed, church, or sectarian denomination whatever": Id., art. 4, sec. 30; Colorado: "Any denominational or sectarian institution or association": Const. 1876; Gen. Stats. 1883, art. 5, sec. 34; or, "In aid of any church or sectarian society, or for any sectaian purpose, or to help support or sustain any school . . . controlled by any church or sectarian denomination whatsoever, . . . to any church or for any sectarian purpose": Id., art. 9, sec. 7; Georgia: "Directly or indirectly in aid of any church, sect, or denomination of religionists, or of any sectarian institution": Const. 1877; Code 1882, art. 1, sec. 14; Indiana: "Any religious or theological institution": Const. 1851; Rev. Stats. 1883, art. 1, sec. 6; Kansas: "No religious sect or sects shall ever control any part of the common-school or university funds": Const. 1859; Dassler's Compiled Laws 1885, art. 6, sec. 8; Louisiana: "Any sectarian schools": Const. 1879; Acts 1880, art. 51, sec. 228; Massachusetts: "Any religious sect for the maintenance exclusively of its own school": Const. 1780; Pub. Stats. 1882, amend. 18; Michigan: "Any religious sect or society, theological or religious seminary": Const. 1850; Howell's Stats. 1882, art. 4, sec. 40; Minnesota: "Any religious societies or religious or theological seminaries": Const. 1857; Gen. Stats. 1878, art. 1, sec. 16; or, "Schools wherein the distinctive doctrines, creeds, or tenets of any particular Christian or other religious sect are promulgated or taught": Id.,

art. 8, sec. 3; Mississippi: "No religious sect or sects shall ever control any part of the school or university funds": Const. 1869; Code 1880, art. 8, sec. 9; Missouri: "In aid of any religious creed, church, or sectarian purpose, or to help to support or sustain any private or public school . . . controlled by any religious creed, church, or sectarian denomination whatever, . . . for any religious creed, church, or sectarian purpose whatever": Const. 1875; Rev. Stats. 1879, art. 11, sec. 11; or, "Directly or indirectly in aid of any church, sect, or denomination of religion": Id., art. 2, sec. 7; Nebraska: State shall not accept "any grant, conveyance, or bequest . . . to be used for sectarian purposes": Const. 1875; Comp. Stats. 1887, art. 8, sec. 11; Nevada: "For sectarian purposes": Const. 1864; Comp. Laws 1873, art. 11, sec. 10; New Hampshire: "Use of the schools or institutions of any religious sect or denomination": Const. 1792; Gen. Laws 1878, art. 2, sec. 83; Ohio: "No religious sect or sects shall ever have any exclusive right to or control of the school funds": Const. 1851; Rev. Stats. 1880, art. 6, sec. 2; Oregon: "Any religious or theological institution": Const. 1857; Hill's Annotated Laws 1887, art. 1, sec. 5; Pennsylvania: "Any sectarian school": Const. 1874, art. 10, sec. 2; or, "Any denominational or sectarian institution, corporation, or association": Id., art. 3, sec. 18; South Carolina, same as Ohio, with addition of words "any part" after "control of": Const. 1868; Gen. Stats. 1882, art. 10, sec. 5, amend.; Texas: "Any sect or religious society, theological or religious seminary": Const. 1876; Rev. Stats. 1879, art. 1, sec. 7; or, "Any sectarian school": Id., art. 7, sec. 5; Virginia: Legislature shall not "confer any peculiar privileges or advantages on any sect or denomination": Const. 1870; Acts 1876-77, art. 5, sec. 14; West Virginia, same as Virginia: Const. 1872; Acts 1883, art. 3, sec. 15; Wisconsin: "Religious societies, or religious or theological seminaries": Const. 1848; Rev. Stats. 1878, art. 1, sec. 18.

In view of the above decisions and constitutional provisions, we conclude that the words used in the several constitutions in point, where the language does not expressly so indicate, must have been intended by the people who ratified them to provide against the promulgation or teaching of the distinctive doctrines, creeds, or tenets of any particular Christian or other religious sect in schools or institutions where such instruction was to be paid for out of the public funds, or aided by such funds or by public grants; and that a school or institution is sectarian when the doctrines or tenets of some particular faith, sect, or religion are taught to the exclusion of others; and especially so where a school or institution has a distinctive or strict denominational name, descriptive or indicative of the fundamental doctrines of the sect to which it belongs; or where a school or institution is under the exclusive control of a sect having such name, and by a course of instruction excluding all others, seeks to inculcate its tenets alone, it is then sectarian, and it makes no difference that pupils of all sects, denominations, and religious beliefs, or those of no belief, are permitted the advantages of such school or institution. It is what is taught that is the determining factor.

WHAT CONSTITUTIONAL PROVISIONS ARE SELF-EXECUTING. — "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles without laying down rules by means of which those principles may be given the force of law:" Cooley's Constitutional Limitations, 5th ed., sec. 83, p. 100. We would add that it is also not self-executing where such provision in express language requires or commands legislative

action to give force and effect to or to carry out the purposes contemplated. Where a constitutional provision concerning revenue and taxation contains a clause restricting and limiting taxation for school purposes, it requires no legislation to enforce it, although such constitution contains a proviso by which the prohibition might be removed by legislative action, and a specified popular vote increasing the rate of taxation, since until the increase is made as provided, the constitutional limit prevails, and the proviso does not prevent the restriction from going into effect at once: *St. Joseph's Board of Public Schools v. Patten*, 62 Mo. 444. So the provisions of a constitution are self-executing, and therefore require no legislation to enforce them, where it prohibits the drawing of money from the public treasury, "except in pursuance of appropriations made by law," such provisions, immediately upon adoption of the constitution, become "operative and effective, not only prospectively, but as to all existing appropriations": *State ex rel. Missouri State Board v. Holladay*, 64 Mo. 526. By the terms of the Illinois constitution of 1870, art. 9, sec. 12, the amount to which any county, city, township, or school district, or other municipal corporation, may become indebted is limited, and it is also provided therein that the annual tax must be sufficient to pay the interest as it becomes due, and the principal in twenty years, and it was determined that this provision was self-executing: *City of St. Louis v. People*, 124 Ill. 655; citing *People v. Bradley*, 60 Id. 390; *Kine v. Defenbaugh*, 64 Id. 291; *Mitchell v. Illinois etc. Co.*, 68 Id. 286; *Law v. People*, 87 Id. 385. So it was decided in *Bass v. Mayor of Nashville*, Meigs, 421, 33 Am. Dec. 154, that a constitutional provision that the legislature "shall pass laws to prohibit the sale of lottery tickets" was in itself a prohibition. So where the constitution contains a positive inhibition against the legislature passing a law under which an individual's private property can be taken or damaged for public use without compensation, such constitutional provision secures the private rights of the individual, and is self-executing. "It is a limitation not only upon the rights of individuals and corporations, but also upon the legislatures of the states"; and the court declares that it had never seen it contended that such a clause of a constitution "requires legislation to put it in force": *Johnson v. City of Parkersburg*, 16 W. Va. 402; 37 Am. Rep. 779; *People ex rel. McRoberts*, 62 Ill. 38, 41. And a homestead exemption, under the constitution, of "every homestead not exceeding eighty acres," is self-executing, being so held upon the ground that it was "intended thereby to declare the personal rights of the citizen," and such provision "is legislative in its character, and needs no legislation to put it in force; . . . is not in form or substance a command or direction to the legislature. It intended to exempt the homestead as an accomplished fact, not to instruct the legislature how it should be done": *Miller v. Marx*, 55 Ala. 322, 331, 332; and the court in *Beecher v. Baldy*, 7 Mich. 488, 500, in passing upon a similar constitutional provision, says: "We fully admit that the constitutional provision is an express prohibition against a forced sale on execution of the homestead which it describes, and as such prohibition that it needs no legislation to give it effect." But where such constitutional provision relative to homestead exemptions is manifestly dependent on subsequent legislative action, it is not self-executing: Cooley's Constitutional Limitations, 5th ed., sec. 83, p. 100. A provision in a constitution which declares that "any city containing a population of more than one hundred thousand inhabitants may frame a charter for its own government," does not require legislative action to enforce it, and is self-executing: *People v. Hoge*, 55 Cal. 612, 618. So a clause prohibiting the introduction of slaves into a state as merchandise or for sale, on and after a certain date,

does not require legislative aid to make it effective: *Yerger v. Rains*, 4 Humph. 259. So a clause which forbids "the imposition of any tax upon that portion of the merchant's capital which is used in the purchase of goods which are sold to non-residents and taken out of the state, . . . executes itself, and must be obeyed with or without appropriate legislation on the subject": *Friedman Bros. v. Mathes*, 8 Heisk, 488, 499. So when the constitution declares the amount to be paid an officer, it is "an appropriation made by law, and no legislative act is necessary": *State ex rel. Roberts v. Weston*, 4 Neb. 216; citing *Thomas v. Owens*, 4 Md. 189. But a constitution which provides that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws," is not self-executing, since it requires "the action of the law-making power to give it vitality": *Green v. Aker*, 11 Ind. 223; nor is a constitutional provision self-executing which, although it provides for the establishment of a system of town governments, yet makes it the imperative duty of the legislature to create them: *Ex parte Wall*, 48 Cal. 279; 17 Am. Rep. 425, 430, 431; nor is a clause of the constitution self-executing which provides that the capital stock of corporations "shall not be increased except in pursuance of general law," nor without the consent of stockholders "holding the larger amount in value of the stock, at a meeting called" upon notice, "as may be provided by law," since such clause requires legislation to enforce it: *Ewing v. Orville Mining Co.*, 56 Cal. 649, 654.

STOREY v. STOREY.

[125 ILLINOIS, 603.]

PAYMENT OF ALIMONY AFTER DEATH OF HUSBAND. — Consent decree, which provides for payment of alimony to divorced wife "so long as she may be and remain sole and unmarried," is binding upon the husband during his lifetime, and upon his estate after his decease, so long as the wife remains unmarried, and especially so where bond given to secure the payment is made binding upon the obligor, his heirs, executors, and administrators, and a trust deed to secure the bond also recites the conditions of the bond.

Melville W. Fuller, and Miller, Lewis, and Judson, for the appellant.

Trumbull, Willits, Robbins, and Trumbull, for the appellee.

W. C. Goudy, for heirs of Wilbur F. Storey, appellees.

MAGRUDER, J. Maria P. Storey was married to Wilbur F. Storey in June, 1847, and lived with him as his wife until February 17, 1868. In a suit in the circuit court of Cook County, which she instituted against him for divorce, she obtained a decree on February 17, 1868, granting her a divorce for his fault. By the terms of the decree, and of a bond and trust deed dated as of the same day on which the decree was entered, she was allowed alimony to the amount of two thou-

sand dollars per annum, to be paid to her quarterly, in installments of five hundred dollars each.

After the divorce, Wilbur F. Storey married Eureka C. Storey, his present widow, and one of the appellees in this case. He died on October 27, 1884.

The question to be decided is, whether the divorce wife, Maria P. Storey, the appellant herein, is still entitled to receive from the estate of Wilbur F. Storey the annual allowance so awarded to her as alimony, or whether she ceased to be entitled to the payment of such alimony upon the death of Wilbur F. Storey.

The rule which prevailed at common law, that the death of the husband necessarily and of itself put an end to the payment of alimony, was applicable only in divorces *a mensa et thoro*, which did not have the effect of finally and forever terminating the marriage relation, but operated as mere temporary separations, leaving all the other marital rights and obligations in full force. In the case of such divorces, the separation was liable to end at any time by the reconciliation of the parties, and even if no reconciliation took place, the marriage continued to exist until it was dissolved by death.

But where, as under the statute of Illinois, alimony is awarded upon a decree of absolute divorce, which at once puts an end for all time to the marriage relation, the right of the divorced wife to have the payment of alimony continued to her out of the estate of her deceased husband will depend upon the nature and terms of the decree allowing alimony.

While it is true that husband and wife cannot lawfully enter into an agreement for divorce, yet it is well settled that the amount of alimony which the husband is to pay to the wife, and the terms of the payment, and the length of time during which such payment is to continue, may be all arranged between them by consent.

In *Buck v. Buck*, 60 Ill. 242, the recitals of the decree showed that the whole question of alimony was fixed and settled by the agreement of the parties, and it was there held that it was competent for the husband to consent to the provisions of the decree, and that, having done so, he was bound by them, and could have no relief against his own voluntary agreement. Where the court has jurisdiction of the subject, the consent of the parties will authorize it to enter a valid decree or judgment in accordance with their agreement. Where husband and wife agree upon alimony, the court will embody their

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agreement upon that subject in its decree: *Stratton v. Stratton*, 77 Me. 377; 52 Am. Rep. 779; *Fletcher v. Holmes*, 25 Ind. 458; *Carson v. Murray*, 3 Paige, 483; *Miller v. Miller*, 64 Me. 484.

The decree for alimony entered in the case at bar was a consent decree. A portion of its language is as follows: "And the cause further coming on to be heard on the question of alimony and maintenance of the said complainant, it is thereupon, by and with the consent of the said parties complainant and defendant, ordered, adjudged, and decreed that the said defendant, Wilbur F. Storey, do from henceforth pay, or cause to be paid, to and for the use of the said complainant, for so long as she may be and remain sole and unmarried, the sum of two thousand dollars per annum, to be paid to her quarterly, in installments of five hundred dollars each, the first of which shall be payable on the first day of June, A. D. 1868, and the same sum every three months thereafter, during the time aforesaid, at such place or places in Chicago as she shall from time to time appoint."

In addition to the consent embodied in the decree, and on the same day on which the decree was entered, Wilbur F. Storey executed to Maria P. Storey a bond in the sum of fifty thousand dollars, conditioned for the performance of the decree of alimony, in which bond, after reciting the terms and provisions of the decree, Mr. Storey uses the following language: "Which said order and the terms thereof the said obligor hath agreed and doth hereby agree, to stand to, abide by, and perform." It thus appears that he made a written agreement to pay appellant two thousand dollars per annum in the manner and for the period above stated.

It is claimed that the words, "for so long as she may be and remain sole and unmarried," were not intended to indicate the period during which alimony should be paid, but merely to designate the time, during the life of Storey, when he should cease to pay the alimony. We do not think that this is the proper construction to place upon the words thus quoted. If appellant had married while her divorced husband was alive, the law would have put an end to any further obligation on his part to pay her alimony: *Stillman v. Stillman*, 99 Ill. 196; 39 Am. Rep. 21.

We think that the words in question are to be interpreted according to their natural sense and meaning. Their natural meaning is, that alimony shall be paid for so long a time as Mrs. Storey shall remain unmarried, whether before or after

her husband's death. This construction receives support from the language subsequently employed, wherein it is ordered that "the same sum" shall be paid "every three months thereafter during the time aforesaid." The words "during the time aforesaid" designate a continuous period during which payment is to be made, and not a mere limit at which payment is to cease.

We do not, however, wish to be understood as resting the conclusion announced in this opinion solely and entirely upon the considerations thus far presented, but upon such considerations in connection with and supported by the views hereinafter set forth.

It is urged by counsel for appellees that the decree in this case merely directs Storey to pay the two thousand dollars, but nowhere intimates that such payment is to be made by his estate or his representatives after his death, and, in support of the position that where no intention to bind the heirs is apparent from the decree itself the obligation to pay alimony ceases at the death of the husband, reference is made to the case of *Lennahan v. O'Keefe*, 107 Ill. 620. In that case, the decree was not based upon the agreement of the parties, but, by its terms, alimony was to be paid in installments "until the further order of the court." The right of revision was expressly reserved, and there was an absence of language showing any intention to bind the heirs. Here, however, there is evidence of an intention to bind the heirs.

The decree for alimony in this case further orders "that said sums of money shall be and they are hereby declared to be a lien upon the following premises and lands, but upon none other, situated in the city of Chicago, county of Cook, and state of Illinois (to wit, part of lots 1 and 2 in block 57 in the original town of Chicago), and that for the better giving notice of said lien and the security of the payment of the said alimony and the performance of all the requirements of this decree, the said defendant execute and deliver a mortgage or trust deed of said land and premises to Sydney Myers in trust for said Maria P. Storey, in proper form"; and further, that he shall pay all taxes and assessments against said premises, and shall keep the rents of the buildings on said premises insured to the amount of two thousand dollars per annum for her benefit.

A trust deed dated February 17, 1868, was executed by Storey to Myers, as trustee, in accordance with the directions

of the decree. This trust deed recites on its face that it was given to secure the bond above mentioned, and fully sets forth all the terms and conditions of said bond. The decree, the bond, and the trust deed, which all bear the same date, must be regarded as one transaction, and must be construed together in determining the intention of the parties in making their agreement for alimony. "It is always allowable to look to the interpretation the contracting parties place on their agreement, either contemporaneously or in its performance, for assistance in ascertaining its true meaning. No extrinsic aid can be more valuable": *Vermont Street M. E. Church v. Brose*, 104 Ill. 206.

Looking at the terms of the bond, which is in the penal sum of fifty thousand dollars, we find Mr. Storey, the obligor, using the following language: "I bind myself, my heirs, executors, and administrators," for the payment of said sum. In another part of the bond, after agreeing to insure the rents of the buildings on the property and to assign the policies to Mrs. Storey, the obligor uses this language: "Such insurance to be kept up as long as the said sum of two thousand dollars per annum shall be payable as provided in said decree; and the duty of keeping up said insurance shall be binding upon the heirs, executors, and administrators of the said Wilbur F. Storey, and the grantees and assigns of said premises."

This language of the bond is Mr. Storey's own interpretation of the words, "for so long as she may be and remain sole and unmarried," as used in the decree. If those words did not contemplate that Mrs. Storey was to have her alimony after her husband's death, provided she then continued to be sole and unmarried, it was absurd to make the duty of keeping up the insurance for her benefit binding upon his "heirs, executors, and administrators."

Looking at the terms of the trust deed executed by Mr. Storey, as party of the first part thereto, we find that power is therein given to the trustee or his successor to sell the premises upon default in the performance of any of the agreements therein contained "on the part of said party of the first part, his heirs, executors, administrators, or assigns." The trust deed also contains the following language: "Provided, however, that said party of the first part, his heirs and assigns, may hold and enjoy said premises until default shall be made by him or them in the premises; . . . and it is hereby . . .

agreed by said grantor for himself, his heirs and assigns, that in case said trustee shall die, it shall be lawful for the judge, etc., with notice to said Wilbur F. Storey, his heirs or assigns, to appoint some other person," etc.

It is apparent, from the phraseology thus quoted, that the agreement for the payment of appellant's alimony was to be binding not only upon Mr. Storey in his lifetime, but upon his estate after his death, so long as she continued to remain unmarried. Furthermore, in August, 1882, Wilbur F. Storey conveyed the above premises to one Adams, who executed a note for thirty thousand dollars, and a trust deed to Lambert Tree to secure the same; and in such note and trust deed, it was agreed between Adams and Storey that, in case the latter, "his heirs, executors, administrators, or assigns," should fail to make the payments specified in Mrs. Storey's bond, it should be lawful for Adams, his heirs, etc., to make the same in order to keep the premises from being sold under the encumbrance.

Authority is not wanting to show that a husband may make an agreement for the payment of alimony to his wife during her life: *Carson v. Murray, supra*; and that he may make such an agreement binding upon his administrator: *Miller v. Miller, supra*.

Under certain circumstances, as where the wife owns property at the time of her marriage, or has aided her husband by her own exertions in acquiring his estate, it has been held that she may receive as alimony a certain sum of money or a certain amount of property in gross to be kept and retained by her as her own: *Von Glahn v. Von Glahn*, 46 Ill. 134.

Here the equities in appellant's favor appeal strongly against the withdrawal of the support provided for her by the agreement of her husband. She was the wife of his youth, and lived with him twenty years or more, and bore him one child. By her and his joint exertions the value of his fortune had reached nearly a half million of dollars at the time of the divorce.

We are of the opinion that the annual allowance of two thousand dollars to be paid according to the provisions of the decree of February 17, 1868, as above set forth, should be continued to the appellant so long as she remains sole and unmarried.

The decrees of the appellate and circuit courts are reversed,

and the cause is remanded to the circuit court, with directions to proceed in accordance with the views herein expressed.

ALLOWANCE OF ALIMONY TO DIVORCED WIFE FOR LIFE subsists against the estate of the husband after his death: *Stratton v. Stratton*, 52 Am. Rep. 779.

BUTLER v. PEOPLE.

[125 ILLINOIS, 641.]

ONE WHO IN ATTEMPT TO KILL ONE PERSON BY MISTAKE KILLS ANOTHER IS GUILTY OF MURDER OR MANSLAUGHTER; but where two parties assault a third, who in the attempt to shoot them kills another by mistake, the assaulting parties are not guilty of or responsible for such killing, where there was nothing in the character of the assault which would justify a prudent man in resorting to a revolver, and there was no concert of action, and no common design or purpose between them and the assaulted party.

THE defendants William Butler and Franklin Butler were found guilty of manslaughter and sentenced to imprisonment, and the case was brought to this court by writ of error. The facts were substantially these: The defendants were present at a horse-fair, with others, including the deceased and one Conrey, the village marshal. While making some disturbance the marshal requested them to keep quiet, and upon their refusal attempted to arrest William Butler, who resisted and was aided by Franklin Butler. The by-standers interfered to prevent the fighting, when the marshal then fired his revolver, killing John Butler, who was merely standing by, and was not connected with the assault or subsequent fight. The following instruction was given by the court: "18. If the jury believe from the evidence beyond a reasonable doubt that the defendants, or any of them, willfully disturbed the peace and quiet of any neighborhood in the village of Prairie City by loud or unusual noises, or by tumultuous or offensive carriage, and that they did so for the purpose or with the expectation that the witness Conrey would attempt to arrest them therefor, and that said Conrey was then and there an acting village constable or marshal in said Prairie City, and that such defendants or defendant then knew that fact, and that said Conrey thereupon undertook to arrest them, or any one of them who may have created such disturbance, if any of them did, and they resisted such arrest and assaulted and beat said Conrey, and were actually, or as it would appear to a reasonable and prudent

man under the same circumstances, about to inflict on him great bodily harm, and said Conrey in order to protect himself from receiving such harm, and in his necessary or apparently necessary self-defense fired his pistol, and that the ball from said pistol by accident hit and killed the deceased, John Butler, then the defendants, or such of them, if any, as aided or assisted or encouraged such assault and beating, if any there was, would be guilty of killing said John Butler."

Neece and Son, and James M. Blazer, for the plaintiffs in error.

H. C. Agnew, state attorney, and *Tunnichliff and Tunnichliff*, for the people.

CRAIG, C. J. It may be regarded as a well-settled principle of law, that a man will be held guilty of murder or manslaughter who in the attempt to kill one person by mistake kills a third person, although there is no intent or design to kill such third person. So, also, where a number of persons conspire together to do an unlawful act, and in the prosecution of the common design a person is killed, all will be guilty of murder. Wharton (vol. 2, sec. 998) says: "If the unlawful act was a trespass, the murder, to affect all, must be done in the prosecution of the design. If the unlawful act be a felony, it will be murder in all, although the death happened collaterally, or beside the principal design." Russell on Crimes (vol. 1, page 540) says: "Where divers persons resolve, generally, to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, as by committing a violent desseisin with great numbers of people, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must, when they engage in such bold disturbances of the public peace, at their peril abide the event of their actions, and therefore, if in doing any of these acts they happen to kill a man, they are all guilty of murder." In 1 Hale's Pleas of the Crown, 441, the doctrine is stated thus: "If divers persons come in one company to do an unlawful thing, as to kill, rob, or beat a man, or commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this may be adjudged murder in them all that are present of that party abetting him and consenting to the act, or ready to aid him, although they did but look on."

No person can be held responsible for a homicide unless the act was either actually or constructively committed by him; and in order to be his act, it must be committed by his hand, or by some one acting in concert with him, or in furtherance of a common design or purpose. Where the criminal liability arises from the act of another, it must appear that the act was done in furtherance of the common design, or in prosecution of the common purpose for which the parties were assembled or combined together, otherwise a person might be convicted of a crime to the commission of which he never assented, which could not be done upon any principle of justice. The two defendants, William and Franklin Butler, in making an assault upon Conrey, were guilty of a breach of the peace, and if, while engaged in the encounter, either one had fired the shot which killed the deceased, both would have been guilty of the crime, although they had no design or intention to injure or kill the deceased. That, however, is not the question presented by this record. Here, under the instructions of the court, the two defendants are held responsible for the shooting done by Conrey, although there was no concert of action whatever between him and them. There was no common design or purpose existing between the two defendants and Conrey. They had not assembled or come together for the commission of any unlawful act. They were enemies, — belonged to opposite factions; and we know of no principle upon which it can be held that the defendants are liable for an act of Conrey. It is true, the defendants assaulted Conrey, and struck him with their fists; but his life was not in peril, nor was he in danger of suffering great bodily harm. There was, therefore, nothing in the character of the assault which could justify a prudent man in resorting to a revolver. But suppose there was, we know of no well-settled rule of law which would hold the defendants liable for the acts of Conrey. They would be responsible for what they did themselves, and such consequences as might naturally flow from their acts and conduct; but they never advised, encouraged, or assented to the acts of Conrey, nor did they combine with him to do any unlawful act, nor did they, in any manner, assent to anything he did, and hence they could not be responsible for his conduct towards the deceased.

It would be a strange rule of law, indeed, to hold a man liable for a crime which he did not commit, which he did not advise, and which was committed without his knowledge or assent, express or implied; and yet, if the conviction in this

case is to be sustained, it can only be done by the sanction of such a doctrine. *Commonwealth v. Campbell*, 7 Allen, 541, 83 Am. Dec. 705, is a case in point. It was there held that a rioter cannot be held guilty of murder or manslaughter by reason of the accidental killing of an innocent person by those who are engaged in suppressing the riot. The rule announced in the case is approved by Bishop on Criminal Law, vol. 1, sec. 637.

The judgment will be reversed and the cause remanded.

ONE MAY BE GUILTY OF WRONG WHICH HE DID NOT SPECIFICALLY INTEND if it came naturally or even accidentally through some other specific or a general evil purpose: *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320.

ONE WHO, IN UNSUCCESSFUL ATTEMPT TO COMMIT SUICIDE, ACCIDENTALLY KILLS ANOTHER, who is trying to prevent it, is guilty of criminal homicide: *Commonwealth v. Mink*, 123 Mass. 422; 25 Am. Rep. 109. And see *State v. Emory*, 78 Mo. 77; 47 Am. Rep. 92; *Robertson v. State*, 2 Lea, 239; 31 Am. Rep. 602; *State v. Hardie*, 47 Iowa, 647; 29 Am. Rep. 496; *Washington v. State*, 60 Ala. 10; 31 Am. Rep. 28; *Moynihan v. State*, 70 Ind. 126; 36 Am. Rep. 178.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

BAKER v. STATE.

[25 TEXAS APPEALS, 1.]

ARSON. — **INDICTMENT IS SUFFICIENT** which charges in first count that defendant burned his own house, the said house being at the time insured; and in the second count that he burned his own house, thereby endangering the safety of houses belonging to other persons. It is unnecessary, in such case, to allege the amount of the insurance upon the house, the company in which it was insured, or other facts in relation to the insurance, nor who owned the houses which were endangered by the burning of defendant's house.

THE LOCUS IN QUO OF A HOUSE BURNED IS SUFFICIENTLY ALLEGED where it is set forth as "a certain house then and there owned by him the said" defendant, the words "then and there" referring to a time and county previously stated.

PRACTICE — INSTRUCTIONS. — **STATE MAY BE REQUIRED TO ELECT UPON WHICH COUNT OF AN INDICTMENT IT WILL CLAIM CONVICTION, ONLY WHEN** distinct felonies not of the same character are charged in different counts in the same indictment. But where there are two counts, and the state itself elects upon which to proceed, and the court sanctions such election, that count alone should be submitted to the jury, who should be instructed that they could not consider and could not convict on the other count.

VOLUNTARY STATEMENTS ARE INADMISSIBLE AS INCUHPATORY EVIDENCE AGAINST ACCUSED WHEN MADE BY HIM UNDER ARREST, WITHOUT BEING FIRST CAUTIONED that any statement he made might be used in evidence against him. The fact that a few hours prior to making such statements the magistrate before whom the charge was being investigated cautioned him that a voluntary statement, if made, might be used in evidence against him, does not dispense with a caution with respect to statements subsequently made on another occasion to another party, and under entirely different circumstances.

Woods and Smith, Brown, Gunter, and Gilbert, and Pasco and Russell, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. There are two counts in the indictment; the first charging that the defendant burned his own house, the said house being at the time insured; the second charged that he burned his own house, thereby endangering the safety of houses belonging to other persons. We are of the opinion that the indictment is substantially sufficient in both its counts, and that the defendant's exceptions thereto, and his motion in arrest of judgment, were properly overruled. The *locus in quo* of the house burned is alleged sufficiently, the allegation being "a certain house then and there occupied, owned, and controlled by him, the said Baker," the words "then and there" referring to the time and county previously stated. It was unnecessary to allege the amount of the insurance upon the house, the company in which it was insured, or other facts in relation to the insurance. It was only necessary to allege that, at the time the house was burned, it was insured. That portion of the first count in the indictment which states that "the amount of said insurance, and a further description of which is to the grand jurors unknown," is surplusage, and should have been treated as immaterial, and wholly disregarded on the trial.

With respect to the second count, we do not think it was essential to allege who owned the houses which were endangered by the burning of defendant's house. Such an allegation is usual and proper, but not absolutely essential, as it is immaterial who owned the houses so endangered, if they were owned by other persons than the defendant.

We learn, from a statement made in the charge of the court, that the county attorney elected to try the defendant upon the first count in the indictment. This is all the information afforded by the record as to the election. There is no notice of it taken in the judgment entry, or in any other entry in the case. We must presume, therefore, from the statement made in the charge of the court, that the state voluntarily abandoned and dismissed the second count. It does not appear that such election was required by the court, nor do we think it could properly have been required. It is only when distinct felonies, not of the same character, are charged in different counts in the same indictment that the state may be required

to elect upon which count it will claim a conviction: *Lunn v. State*, 44 Tex. 85; *Boles v. State*, 13 Tex. App. 650; *Chester v. State*, 23 Id. 577. In this case the same felony is charged in each count.

But the state having elected to try the defendant upon the first count, and the court having sanctioned such election, that count alone should have been submitted to the jury, and the jury should have been explicitly instructed that they could not consider and could not convict upon the second count. In defining arson, the learned judge, in his charge to the jury, embraced both counts in the indictment; that is, burning an insured house, and burning a house the burning of which endangered other houses not belonging to defendant. That portion of the charge which embraced the arson charged in the second count is erroneous, because it is not the law applicable to the case, and because it submitted to the jury an issue not in the case. This error in the charge, not having been excepted to, would not be reversible error unless it was calculated to injure the rights of the defendant, and whether the error is of that character we do not determine, as it is unnecessary that we should do, there being another error for which the judgment must be set aside.

We are of the opinion that the court erred in admitting the testimony of the witness Pelfry, detailing a conversation which the defendant had with him at a time when the defendant was under arrest. This testimony was evidently introduced by the state as inculpatory; as a circumstance tending to prove defendant's guilt; as a *quasi* confession of guilt. If not introduced for this purpose, it was wholly irrelevant, and should for that reason have been rejected.

If introduced as inculpatory evidence, it was inadmissible, because the statements were made by the defendant while he was under arrest, and without being first cautioned that any statement he made might be used in evidence against him. The fact that, a few hours prior to the time of making said statements, he had been cautioned by the magistrate before whom the charge against him was being investigated, that a voluntary statement, if he should make one, might be used in evidence against him, does not, we think, dispense with a caution with respect to statements subsequently made, on another occasion, to another party, and under entirely different circumstances. The caution given him by the magistrate related alone to a voluntary statement,—a judicial proceed-

ing in the presence of the court, — a written statement, to be signed by the defendant. It would be stretching the rule too much, we think, to apply a caution made under such circumstances to any and all statements made by the defendant on subsequent occasions.

We do not agree to the rule as stated in *Barnes v. State*, 36 Tex. 356, that the caution must immediately precede the confession. That rule, we think, is too extreme, and in the subsequent case of *Maddox v. State*, 41 Id. 205, it was not strictly adhered to. We think the true rule is, that if the defendant was properly cautioned that statements made by him might be used in evidence against him, and he thereafter, within a reasonable time, made statements reasonably coming within the scope of the caution given him, such statements would be admissible against him.

But we do not think the statements made by the defendant in this instance come within this rule. They are not statements reasonably embraced within the caution given the defendant by the magistrate, for that caution was limited to a voluntary statement, and was not intended to, and could not, we think, apply to any other statement. This is a new question, as far as we are aware, and we have been unable to find any authority which has aided us in reaching a conclusion upon it. The conclusion we have arrived at is based alone upon what we conceive to be the spirit of the law regulating the admissibility in evidence of confessions. Confessions of persons in confinement, or in the custody of an officer, are only admissible under the conditions prescribed in the statute, and the caution required in the case of a voluntary statement is a distinct caution from that required in the case of other confessions, and is applicable alone to the statements made before the magistrate, reduced to writing, and signed by the defendant: Code Crim. Proc., art. 750.

Other errors assigned and presented in the brief and argument of counsel for defendant have received our attention; but we are of the opinion that the only material errors are those which we have discussed, and because of the last named of which, the judgment is reversed, and the cause is remanded.

ARSON, SUFFICIENCY OF INDICTMENTS FOR: *State v. Toole*, 29 Conn. 342; 76 Am. Dec. 602; *Kellenbeck v. State*, 10 Md. 431; 69 Am. Dec. 166; *Mary v. State*, 24 Ark. 44; 81 Am. Dec. 60, and note 67-69; *State v. Gailor*, 71 N. C. 88; 17 Am. Rep. 3; indictment charging as a single act the burning of sev-

eral houses charges but one offense, and is not bad for duplicity: *Woodford v. People*, 62 N. Y. 117; 20 Am. Rep. 464.

CONFESSIONS, WHEN ADMISSIBLE AS VOLUNTARY, — *Carr v. State*, 24 Tex. App. 562; 5 Am. St. Rep. 905, and note 908; *Biscoe v. State*, 67 Md. 6; *Pascal v. State*, 77 Ga. 596; *People v. Yeaton*, 75 Cal. 415; *State v. Ellis*, 97 N. C. 447, — are presumed to have been voluntarily made, in the absence of all evidence: *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501; but see *Amos v. State*, 83 Ala. 1; 3 Am. St. Rep. 682.

ELECTION, WHEN COMPELLED: *State v. Nelson*, 14 Rich. 169; 94 Am. Dec. 130.

BONNARD v. STATE.

[25 TEXAS APPEALS, 178.]

MURDER. — EVIDENCE IS ADMISSIBLE TO SHOW MOTIVE, HOSTILITY, INTEREST, OR BIAS OF WITNESS TOWARD ACCUSED, as that witness had had some difficulty with the accused the night preceding the shooting, and had followed accused, threatening to see him again and shoot him.

MURDER — EXPLANATORY STATEMENTS OF ACCUSED AS EVIDENCE. — Where prosecution proves by certain witnesses the statements accused had made to them, the defense is entitled to prove what statements he had made to another, in order to explain the statements made to the witnesses for the prosecution, under the statutory rule that "when a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence": Texas Code Crim. Proc., art. 751.

ACCUSED IS GUILTY OF MURDER if the killing is consequent upon a difficulty between him and the deceased, no matter which provoked it, and there had been an enmity between the parties for some months, and accused had made serious threats against the deceased, which had been communicated to him, and he was anticipating trouble with accused when he should meet him, and was prepared therefor, and under these circumstances both parties had determined to bring on a difficulty when they should meet, in which the one intended to kill the other, or inflict serious bodily injury, which might result in death.

KILLING IS MANSLAUGHTER ONLY if accused did not intend to provoke a difficulty with deceased, but sought an interview with him solely to obtain payment of a claim, and a difficulty ensued, in which accused, on account of abuse heaped upon him by deceased, voluntarily slew him in heat of passion engendered by the present abuse, taken in connection with the previous wrongs done him by deceased, and the circumstances, all combined, were of such a character as to produce cause adequate to render the mind incapable of cool reflection.

INSTRUCTION. — KILLING IS MANSLAUGHTER ONLY if accused sought interview with deceased with no hostile intentions, and deceased became enraged, and committed an assault upon defendant, which inflicted pain or bloodshed, and under the passion thus engendered accused shot and killed deceased; and an instruction is radically defective which does not present this phase of the law in affirmative terms.

KILLING IS JUSTIFIABLE ON GROUND OF NECESSARY SELF-DEFENSE if accused sought an interview with deceased with no hostile intentions, but solely to demand settlement and payment of a claim, and deceased became angry and a wordy altercation ensued, during which deceased drew his pistol, and assaulted accused in such a manner as to create in the latter's mind a reasonable apprehension of death or serious bodily injury, and, acting upon such reasonable apprehension, accused fired the fatal shot.

APPEAL from conviction of murder in the second degree. The facts sufficiently appear in the opinion.

Poindexter and Paddleford, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. This appeal is from a judgment of conviction for murder in the second degree. Twenty errors are assigned for reversal, and they relate,—1. To the exclusion of evidence; 2. To errors in the charge of the court to the jury; 3. To the refusal of special requested instructions in behalf of defendant; 4. To the insufficiency of the evidence to support the verdict; and 5. To the overruling of defendant's motion for a new trial. We do not propose to discuss all these assigned errors, but will select those which are, in our opinion, the most important.

I. It was error to exclude the testimony of the witness Joe Bidwell, as shown by the first bill of exceptions, to the effect that on the night before the shooting a difficulty occurred at a party at the house of one Page, between the principal state's witness, Ike Moore, and the defendant, in which the witness Moore had followed the defendant out of the gate, and when defendant told him to stop following him, turned away with the remark, "I'll see you again, and will shoot a hole through you a yellow dog can go through. I am a yard wide, all wool, and hard to curry." This evidence was admissible to show the motive, animus, and extent of the feelings of the witness toward defendant. "The motives which operate upon the mind of a witness when he testifies are never regarded as immaterial or collateral matters": *Gaines v. Commonwealth*, 50 Pa. St. 319-326. As to hostility, interest, or bias against a defendant, a witness may be contradicted, if he denies them, by evidence of his own statements or of other implicative facts. "The same rule applies to questions as to quarrels between the witness and the party against whom he is called": Wharton on Criminal Evidence, sec. 485; 1 Greenl. Ev., 13th ed., sec. 455; *Hart v. State*, 15 Tex. App. 202; 49 Am. Rep.

188; *Favors v. State*, 20 Tex. App. 156; *Rosborough v. State*, 21 Tex. App. 672; see also, upon this point, *Newcomb v. State*, 37 Miss. 383; and also the case of *Kent v. State*, Ohio, reported in full in 6 Criminal Law Magazine, 520, in which the cases are reviewed, and the doctrine upon the subject elaborately discussed. It is shown by the evidence that the witness Moore had been a party to and associated with the deceased in all the troubles and difficulties between the latter and the defendant, and the extent to which he was biased was legitimate matter to be considered by the jury in determining the credibility of his testimony.

Defendant's fourth bill of exceptions was taken to the exclusion of his statements made to his brother, John Bonnard, on the night of the difficulty, and when he first met his brother after the difficulty, in which he detailed all the circumstances of the difficulty fully, and in which he also explained to his brother the fact that he had related the circumstances differently to the young ladies at Mrs. Welch's immediately upon his return from the scene of the difficulty, and told him the reasons which induced and influenced him in making the statement as he did make it to those young ladies. The prosecution had proved by these young ladies what defendant's statements to them were, and the defense proposed to prove the statements made to his brother in order to explain these statements, under the statutory rule that "when a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence": Code Crim. Proc., art. 751. We are of opinion the bill of exceptions brings the excluded evidence directly within the purview of the rule as the same has heretofore been construed by this court in *Green v. State*, 17 Tex. App. 395; *Harrison v. State*, 20 Id. 387; 54 Am. Rep. 529; *Rainey v. State*, 20 Tex. App. 455; *Gaither v. State*, 21 Id. 528; and that it was error to exclude the testimony. This case is not analogous to the *Lilly Gibson Case*, 23 Id. 414, in this particular.

Appellant having been convicted of murder of the second degree, this eliminates from discussion all questions as to the correctness of the charge of the court as to murder of the first degree. As to murder of the second degree, manslaughter, self-defense, etc., many attacks are made upon the charge as a whole, and to each particular paragraph, as well as to the action of the court in refusing all of defendant's special re-

requested instructions. It would be a useless consumption of time to attempt a review of all the matters thus presented, and so strenuously urged in the oral arguments and able brief of counsel for appellant. Suffice it to say that, in quite a number of the particulars mentioned, the charge is to some extent confusing if not misleading, and in one of the particulars specially complained of is clearly erroneous. We will summarize the several phases in which the evidence presents the case to our minds, and to which the charge should have been mainly, pertinently, and affirmatively directed.

1. The state's theory was, that defendant and deceased had been at enmity for some months, and defendant had made serious threats against the deceased; these threats had perhaps been communicated to deceased, and he was anticipating and prepared for trouble with defendant when he should meet him. Now, if, under these circumstances, both parties had determined in their minds to bring on a difficulty when they should meet, in which the one intended to kill the other, or inflict serious bodily injury which might result in death, then if such was the case, and a difficulty and death ensued, no matter which provoked it, the party killing would be guilty of murder: Penal Code, art. 603.

2. If defendant, however, did not intend to provoke a difficulty with deceased, but sought the interview with him solely for the purpose of demanding pay for his spurs, and a difficulty ensued, in which defendant, on account of abuse heaped upon him by deceased, voluntarily slew him in heat of passion engendered by the present abuse, taken in connection with the previous wrongs done him by deceased, and the circumstances all together combined were of such a character as to produce adequate cause sufficient to render the mind incapable of cool reflection, then such killing would be manslaughter: *Wadlington v. State*, 19 Tex. App. 266; *Johnson v. State*, 22 Id. 206; *Howard v. State*, 23 Id. 265.

3. If defendant sought an interview with deceased with no hostile intentions, and deceased became enraged and committed an assault upon defendant which did inflict pain or bloodshed, and under the passion thus engendered defendant shot and killed deceased, the pain or bloodshed would amount to "adequate cause," and the killing would be manslaughter. The charge of the court was radically defective in not presenting this phase of the law of the case in affirmative terms: *Hill v. State*, 8 Tex. App. 142; *Foster v. State*, 8 Id. 249.

4. If defendant sought the interview with deceased with no hostile intentions, but simply and solely to demand a settlement and pay for his spurs, and deceased became angry and a wordy altercation ensued, during which deceased drew his pistol and assaulted defendant with it in such a manner as to create in defendant's mind a reasonable apprehension of death or serious bodily injury, and, acting upon such reasonable apprehension, defendant fired the fatal shot, then and in that event he would be justifiable, upon the ground of necessary self-defense: See Willson's Crim. Stats., sec. 1070.

These are, in our opinion, in brief, the essential principles of law applicable to the facts of the case as shown by the record, and they should have been submitted plainly, fully, and affirmatively, and without unnecessary verbiage, by the charge. For the errors pointed out, the judgment is reversed and the cause remanded.

WHEN MOTIVE OF WITNESS IN PERFORMING PARTICULAR ACT, or in making a particular declaration, becomes material in a cause, he may himself be sworn in regard to it: *Kerrains v. People*, 60 N. Y. 221; 19 Am. Rep. 158.

MURDER, INGREDIENTS OF—INTENT: *State v. Landgraf*, 95 Mo. 97; 6 Am. St. Rep. 26, and note 31; *Tiffany v. Commonwealth*, 121 Pa. St. 165; 6 Am. St. Rep. 775, and note 780; *Lang v. State*, 84 Ala. 1; 5 Am. St. Rep. 324, and note 328; *Schaffer v. State*, 22 Neb. 557; 3 Am. St. Rep. 274, and note 279; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320.

MANSLAUGHTER, KINDS OF, AND WHAT AMOUNTS TO: *State v. Ellick*, 2 Winst. 56; 86 Am. Dec. 442; *Golliher v. Commonwealth*, 2 Duvall, 163; 87 Am. Dec. 493; *State v. Hardie*, 47 Iowa, 647; 29 Am. Rep. 496; *State v. Emory*, 78 Mo. 77; 47 Am. Rep. 92; *Harrington v. State*, 83 Ala. 9.

SELF-DEFENSE, RIGHT OF: *Tillery v. State*, 24 Tex. App. 251; 5 Am. St. Rep. 882, and cases collected in note 887; *Fariss v. State*, 85 Ala. 1; *Vollmer v. State*, 24 Neb. 838; *State v. Keasling*, 74 Iowa, 528; *State v. Rose*, 92 Mo. 201; *Duncan v. State*, 49 Ark. 543.

MULLIGAN v. STATE.

[25 TEXAS APPEAL, 199.]

A DEMOLISHED BUILDING IS NOT A "HOUSE," SO AS TO BE THE SUBJECT OF ARSON, within a statute which defines such "house" as "any building or structure inclosed with walls, and covered."

ARSON—BURNING OF PREMISES LEASED BY ACCUSED—INDICTMENT.—

Where accused is a tenant, entitled to occupancy and possession, he is a part owner, and occupies such a relation to the premises as requires that the indictment should allege the particular facts making him amenable to prosecution for arson in case such house has been burned by him: **Texas Penal Code, arts. 658–660.**

J. H. Wood, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. Appellant was convicted of arson. Two counts were contained in the indictment,—one for the burning of a house, and the other for the willful burning of a “pile of wood, the same being a set of house logs.” Defendant’s motion to quash the indictment was sustained as to the second, or the count for willful burning.

Appellant was the tenant of one Duke, and during his tenancy had erected a crib upon the rented premises, which crib the landlord, Duke, refused to pay for when the parties were having their settlement with a view to the expiration of the lease. Defendant declared time and again that he would burn the crib. About the time he was moving or preparing to move from the premises, he pulled down the crib, and in the night before he moved, the logs of which the crib had been built, and which he had torn down, were set fire to and burned. Two questions present themselves in connection with these facts: 1. Was a house burnt? and 2. If a house was burnt, could defendant be convicted for burning it when he was still in possession as a tenant of the leased premises upon which it stood?

“Arson” is defined by our code to be “the willful burning of any house included within the meaning of the succeeding article of this chapter”: Penal Code, art. 651. The succeeding article 652 defines a “house” as any building or structure inclosed with walls, and covered, whatever may be the materials used for building: *Smith v. State*, 23 Tex. App. 357; 59 Am. Rep. 773.

We think it clear that when the building was torn down, it ceased to be “a building or structure,” because it had lost the arrangement of its parts,—its form, make, and construction. It had no longer the inclosure of walls, and it was no longer covered. It had lost all the essential characteristics of “a house.” The logs might still be called “house logs,” but they ceased to be “a house.” They might, perhaps, be classed as lumber or wood, and as such, the appellant might, perhaps, have been prosecuted and convicted for willfully burning them, under the provision of article 665 of the Penal Code, provided he was at all liable for their destruction.

And this brings us to a consideration of the second proposition, viz.: Could defendant be prosecuted and convicted for

arson whilst he was still in possession and control of the leased premises upon which the property was situate when destroyed? At common law, "a man could not commit arson of a house in which he has a lawful claim to abide; as a tenant from year to year, or from month to month, be his term however short; or under an agreement for a lease": 2 Bishop's *Crim. Law*, 7th ed., sec. 13. Mr. Wharton says: "A tenant (occupancy being the test) cannot be guilty, at common law, of arson in burning the property he occupies on lease. On the other hand, a landlord, it would seem, may be guilty of arson in burning his house in a tenant's possession": Wharton's *Crim. Law*, 8th ed., sec. 836; *State v. Hannett*, 54 Vt. 83; 4 Am. *Crim. Rep.*, Gibbons, 38.

Our statute (Penal Code, art. 659) provides for certain exceptions to the rule that even the owner may destroy his own house, one of which is, "when there is within it any property belonging to another"; and article 660 expressly declares that "one of the part owners of a house is not permitted to burn it." Under our statute, the tenant, during his lease, should be considered only a part owner in the house, and the landlord certainly has a property in it which the tenant could not destroy with impunity. Still the tenant is the party entitled to the possession, and arson is regarded as an offense against the security of the habitation rather than that of the property and true ownership. But an indictment against an owner or part owner for burning his own house (arts. 658-660) must allege ownership in the accused, and the particular facts which may bring him within the exceptions as amenable to prosecution: *Tuller v. State*, 8 Tex. App. 501; Willson's *Crim. Forms*, 411. Appellant being a tenant entitled to occupancy and possession, he was at least a part owner, and occupied such relation to the premises as, in our opinion, required that the indictment should have alleged the particular facts making him amenable to prosecution for the arson, in case a house has been burnt by him.

Our conclusions upon the facts and law of the case are, first, that the indictment is insufficient in allegation to warrant the conviction of this defendant as a tenant; and second, if the indictment had been sufficient, the evidence totally fails to establish the crime of arson,—that is, "the burning of a house."

The judgment is reversed and the cause remanded.

ARSON: See *Baker v. State*, ante, p. 427, and note.

ALEXANDER v. STATE.

[25 TEXAS APPEALS, 260.]

KILLING IN SELF-DEFENSE. — WHERE ACCUSED HAS BEEN THREATENED BY DECEASED WITH DEATH OR SERIOUS BODILY INJURY, and such threat has, prior to the homicide, been communicated to the accused, and at the time of the homicide the deceased by any act manifests an intention to execute such threat, the killing is justifiable homicide.

INSTRUCTIONS. — WHERE ACCUSED RELIES UPON THE LAW OF SELF-DEFENSE, evidence as to threats and character of deceased, and his conduct at the time of the homicide, should be affirmatively submitted to the jury, to be considered by them in determining whether or not "adequate cause" for the homicide existed.

INSTRUCTIONS — INTENT TO KILL. —Where jury were instructed what the law was in case the evidence showed that the accused provoked the contest with the deceased, with intent to kill him, they should also, where the evidence warrants it, be instructed as to what the law is when a difficulty is provoked with no intention to kill.

H. F. Fisher, T. E. Conn, and Jones and Garnett, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. It was shown by the testimony of the defendant that, a few days prior to the homicide, deceased had threatened to kill him, and that such threat had been communicated to him. It was also shown that the general reputation of the deceased was that of an overbearing, dangerous man, who would be likely to execute such a threat. It was further shown that, before the defendant shot or attempted to shoot the deceased, or inflict upon him any other violence, he was stricken, or stricken at, by the deceased, who was a powerful, athletic man, with a stick, and that the defendant began shooting at the deceased while the deceased was continuing the assault upon him with the stick.

Such being the evidence in behalf of the defendant, it was the imperative duty of the court to instruct the jury in the law applicable to such evidence,—that is, in relation to such threat and the character of the deceased. It is well settled that if a person accused of culpable homicide has been threatened by the deceased with death or serious bodily injury, and such threat has, prior to the homicide, been communicated to the defendant, and at the time of the homicide the deceased by any act manifested an intention to execute such threat, the defendant would be authorized to act upon appearances, in resorting to any means to protect himself, and a killing under such circumstances would be justifiable homicide. Under

the facts of this case, this rule of the law should have been given to the jury as a part of the law of self-defense.

We are further of opinion that the evidence as to threats, character of deceased, and the conduct of the deceased at the time of the homicide, should have been affirmatively submitted to the jury, to be considered by them in determining whether or not "adequate cause" for the homicide existed: *Sims v. State*, 9 Tex. App. 586; *Williams v. State*, 22 Id. 497. Defendant, at the time of the trial, promptly excepted to the charge of the court, because it omitted to instruct the jury as above indicated. There is no instruction whatever in the charge given to the jury, in relation to the threats shown to have been made by the deceased, etc. This phase of the case, presented by the evidence, is not embraced in any manner in the charge.

There is also error, we think, in that portion of the charge which relates to the rules of the law applicable where the contest in which the homicide takes place is provoked by the defendant. It is not clear to our minds that the evidence authorized a charge upon this subject, but conceding that it did, the whole law relating thereto should have been explained. The jury were instructed what the law was in case the evidence showed that the defendant provoked the contest with the deceased with the intent to kill him, but were not instructed as to what the law is when a difficulty is provoked with no intention to kill. As given, we think this portion of the charge was erroneous, and calculated to prejudice the rights of the defendant: *White v. State*, 23 Tex. App. 154; *Green v. State*, 12 Id. 445.

Other objections are urged to the charge which we deem it unnecessary to discuss or determine, as they will doubtless be eliminated on another trial in supplying the defects already noted, and because of which defects the judgment is reversed, and the cause is remanded.

KILLING IN SELF-DEFENSE, evidence as to threats, and character of deceased: *Tiffany v. Commonwealth*, 121 Pa. St. 165; 6 Am. St. Rep. 775, and cases collected in note 781; and see *Bonnard v. State*, ante, p. 431, and note 435.

EX PARTE STANLEY.

[25 TEXAS APPEALS, 372.]

HABEAS CORPUS. — EXTRADITION WARRANT IS VALID WHICH RECITES, BUT DOES NOT SET FORTH IN FULL, THE AFFIDAVIT upon which it issued. The correct rule is, that where the executive issuing the warrant withholds the papers on which its issuance is based, then the warrant itself must be relied on for the necessary evidence to show that the essential conditions requisite to a valid issuance exist, and it is sufficient that the recitals therein are what the law requires.

EXTRADITION WARRANT IS DULY CERTIFIED which states that the demand of the governor for the fugitive was "accompanied by a copy of said affidavit, duly certified as authentic," although under a literal compliance with the statute it should have stated that said copy was certified as authentic by the governor demanding the fugitive. Such statement that it was "duly certified as authentic" must be held to mean that it was certified according to law.

EXTRADITION WARRANT NEED ONLY STATE FACTS WHICH UNMISTAKABLY SHOW THAT DEMANDED PERSON IS A FUGITIVE from justice from demandant state to another. A direct statement of such fact is not necessary.

EXTRADITION WARRANT NEED NOT SHOW THAT CRIME CHARGED IS A CRIME BY THE LAW OF THE DEMANDING STATE.

EXTRADITION. — UPON HEARING ON HABEAS CORPUS FOR DEMANDED PERSON, it is error to admit in evidence a copy of an affidavit, made in the demandant state, charging applicant with obtaining money under false pretenses, where such affidavit was not part of respondent's return, was not attached to and did not accompany the warrant, was not authenticated as evidence, and was not shown or claimed to be the evidence on which warrant issued; but it is not error which will operate to discharge applicant.

Teel and Halton, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. Appellant was arrested by virtue of the following warrant issued by the governor of Texas, to wit: —

"The State of Texas. To all and singular, the sheriffs, constables, and other civil officers of said state: —

"Whereas, it has been made known to me by the governor of the state of California, that William H. M. Stanley and Bertha Stanley stand charged by affidavit before the proper authorities with the crime of obtaining money under false pretenses, committed in said state, and that the said defendant has taken refuge in the state of Texas; and whereas, the said governor, in pursuance of the constitution and laws of the United States, has demanded of me that I cause the said fugitives to be arrested and delivered to James W. Gillin and John Parrott, who are, as is satisfactorily shown, duly authorized to receive them into custody and convey them back

to said state; and whereas, said demand is accompanied by a copy of said affidavit, duly certified as authentic,—now, therefore, I, L. S. Ross, governor of the state of Texas, by virtue of the authority vested in me by the constitution and laws of this state, and of the United States, do issue this my warrant, commanding all sheriffs, constables, and other civil officers of this state, to arrest, and aid and assist in arresting, said fugitives, and deliver them, when arrested, to the said agents, in order that they may be taken back to said state, to be dealt with for said crime. In testimony whereof," etc.

Appellant applied to Hon. George H. Noonan, judge of the thirty-seventh judicial district, for the writ of *habeas corpus*, which was granted by said judge, and was heard by him in term time, and appellant was remanded to the custody of respondent, the sheriff of Bexar County, who had him arrested by virtue of said warrant. From said judgment appellant has prosecuted this appeal.

Appellant insists that he should be discharged upon the following grounds:—

"1. Because the warrant of arrest does not set out the pretended affidavit upon which the demand of the governor of the state of California upon the governor of Texas is based.

"2. The warrant of arrest does not state that it is based upon an affidavit certified to be authentic by the governor of California.

"3. The warrant of arrest does not show that applicant fled from the state of California, nor does it show that applicant has fled from the justice of the state of California.

"4. The warrant of arrest does not state that the applicant has fled to the state of Texas, or has taken refuge in the state of Texas.

"5. The warrant of arrest does not state or show that obtaining money under false pretenses is punishable by law in the state of California."

We will dispose of these grounds in the order in which they are presented.

1. It was not essential to the validity of the warrant that it should set out in full, or be accompanied by, the indictment or affidavit upon which it is based: *Nichols v. Cornelius*, 7 Ind. 611; *Robinson v. Flanders*, 29 Id. 10; *People v. Pinkerton*, 77 N. Y. 245; *People v. Donahue*, 84 Id. 438. In *Ex parte Thornton*, 9 Tex. 635, this question is referred to; and while the court did not decide it, it intimated that the indictment or

affidavit should be set out in full in the warrant; citing Clark's case, 9 Wend. 212, and Smith's case, 3 McLean, 121. Upon examination of those cases, we do not understand either of them as supporting the view intimated by the court in Thornton's case.

Mr. Church, in his work on *habeas corpus*, says: "A warrant for the arrest and return of a fugitive criminal must recite or set forth the evidence necessary to authorize the state executive to issue it; and unless it does, it is illegal and void." He cites, in support of his text, Doo Woon's case, reported in 18 Fed. Rep. 898. That case fully supports the text, and cites as authority Smith's case, 3 McLean, 121, and Thornton's case, 9 Tex. 635. In Woon's case, the warrant neither recited nor set forth the evidence upon which it was issued, and for that reason was held invalid.

In the case we are considering, the warrant recites, but does not set forth in full, the affidavit upon which it is issued. We have found no decision or authority which requires that the warrant should set forth the evidence in full, except the intimation referred to in Thornton's case. The correct rule is, we think, laid down in Donahue's case, 84 N. Y. 438, in a *syllabus* as follows: "Where the papers upon which a warrant of extradition is issued are withheld by the executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issuance have been complied with, and it is sufficient if it recites what the law requires."

The second ground is not, we think, a substantial one. The warrant states that the demand of the governor of California for the fugitives was "accompanied by a copy of said affidavit, duly certified as authentic." It would have been a literal compliance with the statute if it had stated that said copy was certified as authentic by the governor of the state of California. But the statement that it was "duly certified as authentic" must mean that it was certified according to law; that is, that it was certified by the governor or chief magistrate of the state of California, as it could not have been duly certified by any other authority: R. S. U. S., art. 5278.

The third and fourth grounds are, we think, untenable. While there is no direct statement in the warrant that the appellant fled from the state of California, or from the justice of that state, to the state of Texas, and had taken refuge in the latter state, it states facts which clearly and unmistakably show that he was a fugitive from justice from the state of Cali-

fornia to the state of Texas, within the meaning of the constitution and the statute: Spear on Extradition, 273.

The fifth and last ground is not a valid one. It is not required that the warrant should show that the crime charged in the indictment or affidavit is a crime by the law of the demanding state: Spear on Extradition, 287 et seq.

We are of the opinion that the warrant is in substantial compliance with the statute. No form for such a warrant is prescribed by law; and when it shows upon its face, with reasonable certainty, as does the warrant in question, that the essential prerequisites to its issuance have been complied with, it must be held *prima facie* valid.

It appears by a bill of exception that the respondent, over the objection of the applicant, read in evidence a copy of an affidavit made in California, charging applicant with obtaining money under false pretenses. This affidavit was not a part of the respondent's return; was not attached to or accompanying the warrant; was not authenticated as evidence; was not shown or claimed to be the evidence upon which the warrant was issued. It was error to admit it in evidence, but error which cannot operate to discharge the applicant.

The judgment appealed from is in all things affirmed, and it is adjudged that the appellant pay the costs of this appeal.

EXTRADITION—SUFFICIENCY OF PAPERS AND VALIDITY OF WARRANT: See *Kurtz v. State*, 22 Fla. 36; 1 Am. St. Rep. 173, and note 179; *People v. Curtis*, 50 N. Y. 321; 10 Am. Rep. 483. If the governor of one state makes a requisition on the governor of another state for the surrender of a fugitive from justice, and the case is shown to be within the provisions of the constitution of the United States and the act of Congress on the subject, no discretion is vested in the latter governor; but it is his imperative duty to issue his warrant of extradition: *Work v. Corrington*, 34 Ohio St. 64; 32 Am. Rep. 345. In a case of extradition, the court, on *habeas corpus*, having before it the papers upon which the governor's warrant issued, will decide upon their sufficiency: *State v. O'Connor*, 38 Minn. 243.

STICHTD v. STATE.

[25 TEXAS APPEALS, 420.]

SLANDER—**TIME OF THE COMMISSION OF THE ALLEGED OFFENSE MUST BE SHOWN** by prosecution; failure to do so is fatal to a conviction.

ORAL SLANDER CHARGED IN INFORMATION AS UTTERED IN ENGLISH CANNOT BE PROVEN TO HAVE BEEN UTTERED IN GERMAN, although said words when interpreted mean exactly the same as the slanderous words set forth in the information.

Burges and Dibrell, and James Greenwood, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. In the statement of facts before us there is no evidence showing the time of the commission of the alleged offense. This is fatal to the conviction, and the assistant attorney-general confesses the error: *Temple v. State*, 15 Tex. App. 304; 49 Am. Rep. 200.

A novel question is presented in the record. In the information the alleged slanderous words are set forth in the English language. On the trial, over the objections of the defendant, the state was permitted to prove slanderous words uttered by the defendant in the German language, said words when interpreted, meaning substantially the same as the slanderous words set forth in the information. The question presented is, when oral slander is alleged to have been committed by the use of the English language, can such slander committed by the use of the German language be proved, there being no allegation that the slander was uttered in the German language? We are of the opinion that the question must be answered in the negative. In a civil action for slander, the rule is, that where the slanderous words were spoken in a foreign language, they must be set forth, together with a translation into English. To set forth the foreign words alone will not be sufficient. And to allege a publication of English words, and prove a publication of words in another tongue, is a variance: *Townshend on Slander*, sec. 330.

The reasons upon which the above stated rule is founded demand its application with equal if not of greater force in a criminal than in a civil prosecution for slander. In all criminal prosecutions the accused party has the right to be informed by the information or the indictment of the facts charged against him, so that he may prepare to meet them, and he can only be required on the trial to meet and defend against the exact matter charged against him. The allegation

and the proof must meet, and substantially correspond, otherwise the accused might be convicted of a different offense than that with which he is charged, and which he had not been informed he was called upon to meet. To charge a person with uttering slanderous words in the English language certainly does not inform him that he will be required to meet and defend against words uttered by him in a different language. We hold that the court erred in permitting the state to prove the words uttered by the defendant in the German language, and that the slander as charged in the information is materially variant from that proved.

The judgment is reversed, and the cause is remanded.

SLANDER AND LIBEL, variance between allegation and proof: *Wheeler v. Robb*, 1 Blackf. 330; 12 Am. Dec. 245, and note 246-248; *Baker v. Young*, 44 Ill. 42; 92 Am. Dec. 149.

SUFFICIENCY OF COMPLAINT IN SLANDER for words spoken in German is to be tested by the English translation: *K—— v. H——*, 20 Wis. 239; 91 Am. Dec. 397.

LANN v. STATE.

[25 TEXAS APPEALS, 495.]

STATE STATUTE PROHIBITING CARRYING OF PISTOL IS NOT APPLICABLE TO UNITED STATES SOLDIER engaged in the actual discharge of his duties as such; otherwise he is amenable to the law to the same extent and under the same rules as any other individual.

EVIDENCE OF GENERAL CHARACTER OF ACCUSED IS ADMISSIBLE IN HIS BEHALF, WHERE CRIMINAL INTENT IS NECESSARY to constitute offense, and this rule applies to an offense of unlawfully carrying a pistol.

Joseph Jones and J. W. Jones, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. This conviction is for unlawfully carrying a pistol, and is based upon facts in substance as follows: Defendant was found with a pistol on his person in a saloon in the town of Brackett, about twelve o'clock in the night, by a deputy sheriff, who arrested him and took the pistol from him. Defendant at the time was a United States soldier, and the pistol was the property of the United States, and had been issued to him by his commanding officer for use in protecting a government garden, which the defendant had been detailed to take care of, which garden was situated some distance from the barracks, and from the town of Brackett. Defendant went

into the town of Brackett with the pistol on his person about eight o'clock in the evening, and into a saloon, where he was afterwards arrested. He deposited the pistol in the saloon with the bar-keeper, saying at the time that he would call and get it when he got ready to return to the garden. He then left the saloon, and did not return thereto until about twelve o'clock. Upon returning to the saloon he called for the pistol and the bar-keeper gave it to him, asking him at the same time if he did not know that it was against the law to carry a pistol. Defendant replied that he did, but that he was going at once to the garden, and started to go out of the house, but before going out turned and went into the back portion of the house, where he was seen in conversation with other soldiers, and was arrested and the pistol taken from him.

It is contended by the appellant's counsel that our statute prohibiting the carrying of a pistol on or about the person is not applicable to a soldier. This position is, we think, correct, if the soldier, at the time of carrying the pistol, be in the actual discharge of his duties as such. But if he be not in the actual discharge of his duty as a soldier, but is acting without authority, and beyond the scope of his orders, he is amenable to the law to the same extent and under the same rules as any other individual. Thus if the defendant, when he went into Brackett, was in the performance of a duty assigned him by his officer, and in the performance of such duty was authorized by his officer, or by the regulations of the army, to bear arms, he was not guilty of a violation of law. If, therefore, he lawfully carried the pistol into Brackett, and desired to go about the town attending to his private affairs, or for any purpose not relating to the discharge of his duties as a soldier, it was his duty and privilege to lay aside the pistol, and to resume it again when he again entered upon the actual discharge of his military duties. And if he did not resume the pistol until he actual resumed such duties, and was proceeding with reasonable dispatch to perform the same, he would not be guilty of violating the law in having the pistol on his person in the saloon.

To constitute a violation of this statute, there must be an intent to violate it: *Lyle v. State*, 21 Tex. App. 153; *Sanderson v. State*, 23 Id. 520; *Mangum v. State*, 15 Id. 362. In this case there is evidence tending to show that in having and carrying the pistol the defendant did not intend to violate the law, but, on the contrary, sought to obey it, by

divesting himself of the pistol while going about the town of Brackett. It is true that such innocent intent is not made clearly to appear by the evidence. The facts of the case bearing upon the defendant's intent are unsatisfactory, and evidently not fully developed on the trial. As bearing upon this issue, the defendant proposed to prove that his general character for being a peaceable, law-abiding man in that community was good. This proposed testimony was rejected, and he excepted, and in this ruling of the court we think there was material error. In all criminal cases, wherever a criminal intent is necessary to constitute the offense, evidence of the general character of the defendant is admissible in his behalf: *Coffee v. State*, 1 Tex. App. 548; *Lockhart v. State*, 3 Id. 567; *Jones v. State*, 10 Id. 552; *Johnson v. State*, 17 Id. 565.

Because of the error committed in rejecting the evidence offered by defendant to prove his law-abiding character, and because the evidence before us tends to show an honest intention on his part in having and carrying the pistol, the judgment is reversed, and the cause is remanded.

CHARACTER OF DEFENDANT, ADMISSIBILITY OF EVIDENCE OF: *People v. Garbutt*, 17 Mich. 9; 97 Am. Dec. 174, note; *Fields v. State*, 47 Ala. 603; 11 Am. Rep. 771, and note 776; *State v. Bloom*, 68 Ind. 54; 34 Am. Rep. 247; evidence of good character, weight of; *Commonwealth v. Leonard*, 140 Mass. 473; 54 Am. Rep. 485.

EVIDENCE OF DEFENDANT'S BAD CHARACTER IS NOT ADMISSIBLE unless he has first offered evidence to show that his character is good: *People v. Greenwall*, 108 N. Y. 296; 2 Am. St. Rep. 415, and note 420.

CARRYING CONCEALED WEAPONS, OFFENSE OF: See *Fife v. State*, 31 Ark. 455; 25 Am. Rep. 556; *State v. Wilburn*, 7 Baxt. 57; 32 Am. Rep. 551; *State v. Gilbert*, 87 N. C. 527; 42 Am. Rep. 518; *Hutchinson v. State*, 62 Ala. 3; 34 Am. Rep. 1; *Williams v. State*, 61 Ga. 417; 34 Am. Rep. 102; *Gholson v. State*, 53 Ala. 519; 25 Am. Rep. 652; *State v. Smith*, 11 La. Ann. 663; 66 Am. Dec. 208.

HENNERSDORF v. STATE.

[25 TEXAS APPEALS, 697.]

SUNDAY. -- LABOR IN OPERATING ICE FACTORY MAY BECOME A "WORK OF NECESSITY," within exception in a statute which otherwise prohibits laboring on Sunday.

Bell and Drane, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

HURT, J. Appellant was convicted in the county court for laboring on Sunday: Penal Code, art. 183.

Works of necessity are excepted from the operation of this article, and the only question for the decision is, Does the evidence in this record bring the case within this exception? We must look to the facts, which are: The Brownwood Ice Factory was operated on Sunday as alleged. Defendant had the management and control and was present superintending and directing its operation on Sunday. That if said factory were closed from Saturday night at twelve o'clock to Sunday night at twelve o'clock, it would require from twenty-four to thirty hours to reduce the temperature so that ice could be drawn. The first ice drawn from the molds would be spongy, unsalable ice; that the machinery is very sensitive to heat of the sun, and during the summer the temperature in the brine-vats would rise from sixteen to twenty degrees in a day; and that it requires more labor and time to recover a degree above ten degrees than below.

Do these facts present a case of necessity? What is meant by works of necessity? Under very similar statutes to the one under which this prosecution is had, we find this definition: By the word "necessity" we are not to understand a physical and absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of any particular case may be deemed "necessity" within the statute: *Flagg v. Inhabitants of Millbury*, 4 Cush. 243; *Commonwealth v. Knox*, 6 Mass. 76; *Pearce v. Atwood*, 13 Id. 354.

Nor will it do to limit the word "necessity" to those cases of danger to life, health, or property which are beyond human foresight to control. On the contrary, the necessity may grow out of, or indeed be incident to, a particular trade or calling, and yet be a case of necessity within the meaning of the act. For it is no part of the design of the act to destroy or impose onerous restrictions upon any lawful trade or business; and

hence, under a similar statute, it has been held in a sister state that it is lawful to keep a blast-fireman at work on Sunday, because it is a work of necessity. So, too, it has been held that under special circumstances a mill may grind on that day; and I think it will hardly be questioned that a gas company may supply gas, a water company water, and a dairyman milk to their respective customers on that day: *McGatrick v. Wason*, 4 Ohio St. 566, per Thurman, C. J.

In line with these principles, it is held that such labor on Sunday as is a necessary incident to the accomplishment of a lawful purpose, such as the manufacture of malt beer, is not a violation of the statute: *Crocket v. State*, 33 Ind. 416; *Morris v. State*, 31 Id. 189.

Applying the principles of these cases to this, it is evident that the labor in operating an ice factory is a "work of necessity," and comes within the exception.

The judgment is reversed and the case remanded.

VALIDITY OF CONTRACTS MADE ON SUNDAY: See *Brown v. Browning*, 15 R. I. 422; 2 Am. St. Rep. 908, and note 910.

"WORKS OF CHARITY OR NECESSITY," WHAT ARE, within exception in statute forbidding labor on Sunday: See *Wilkinson v. State*, 59 Ind. 416; 26 Am. Rep. 84; *Yonoski v. State*, 79 Ind. 393; 41 Am. Rep. 614; *Burns v. Moore*, 76 Ala. 339; 52 Am. Rep. 332; subscription for church: *Allen v. Duffie*, 43 Mich. 1; 38 Am. Rep. 159; *Dale v. Knepp*, 98 Pa. St. 389; 42 Am. Rep. 624; *Catlett v. Trustees etc.*, 62 Ind. 365; 30 Am. Rep. 197. Court takes judicial notice that the labor of a barber on Sunday is not necessary: *State v. Frederick*, 45 Ark. 347; 55 Am. Rep. 555. It cannot, however, be ruled as matter of law that the work of shaving an aged and infirm person in his own house on the Lord's day is not a work of "necessity": *Stone v. Graves*, 145 Mass. 373.

JONES v. STATE.

[25 TEXAS APPEALS, 621.]

IDEM SONANS. — IN CHARGING INTENT IN INDICTMENT OF THEFT, THE USE OF "APPRIATE" FOR "APPROPRIATE" IS FATALY DEFECTIVE, where intent to appropriate is an essential and material element of the offense under the statute.

Matthews and Wood, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. This appeal is from a conviction for the theft of a gelding. Defendant made a motion to quash the indictment, one of the grounds of which was, that "it does not charge

any intent on the part of the defendant to appropriate the property alleged to have been stolen to his own use." This motion was overruled, and the question of the correctness of the ruling is presented to us for decision. Instead of the essential statutory word "appropriate," the pleader has used the unmeaning word "appriate," and charges that the property was taken "with intent then and there to deprive the said owner of the value of said property, and appriate the same to the use and benefit of them," etc. We know of no such word in the English language, and as spelled the word is not *idem sonans* with "appropriate." An indictment for theft "must charge explicitly all that is essential to constitute the offense, and cannot be aided by intendment": *Williams v. State*, 12 Tex. App. 395; *State v. Sherlock*, 26 Tex. 106; *Ridge-way v. State*, 41 Id. 231; *Jones v. State*, 12 Tex. App. 424; *Tallant v. State*, 14 Id. 234; *Peralto v. State*, 17 Id. 578.

The intent to appropriate is as essential and material under our statutory definition of theft as any other element of the offense, and we have an express rule of pleading as to the intent which declares that "where a particular intent is a material fact in description of the offense, it must be stated in the indictment": Code Crim. Proc., art. 423.

The assistant attorney-general, in support of the ruling, has called our attention to the case of *State v. Williamson*, 43 Tex. 500, wherein an indictment was held good that charged that the defendant did take, steal, and carry away from the "possession" of the owner, without the consent of the owner, and with intent, etc. As we understand that case, the decision was solely to the effect that the objection to the indictment for the defect insisted upon could not be taken on a motion in arrest of judgment, but should have been interposed before the trial. In the case before us, the objection was raised by motion to quash the indictment before trial.

We are of opinion the court erred in overruling the motion, and that the indictment is fatally defective; wherefore the judgment is reversed and the prosecution dismissed.

INDICTMENT—MISNOMER AND VARIANCE: *People v. Lake*, 110 N. Y. 61; 6 Am. St. Rep. 344, and note 346; *Cross v. People*, 47 Ill. 152; 95 Am. Dec. 474; *Choen v. State*, 52 Ind. 347; 21 Am. Rep. 179, and note 181; *Commonwealth v. Gavin*, 121 Mass. 54; 23 Am. Rep. 255; *Lunsford v. State*, 1 Tex. App. 448; 28 Am. Rep. 414; *State v. Patrick*, 79 N. C. 655; 28 Am. Rep. 340.

MATLOCK v. STATE.

[25 TEXAS APPEALS, 654.]

PRESUMPTION OF GUILT FROM POSSESSION OF STOLEN PROPERTY by accused, and his failure to explain when called upon to do so, depends upon whether such possession was recent or remote; if too remote, he is not bound to explain at all, as where the property stolen was a cow, and was found in possession of the accused two years after the theft.

Harris and Saunders, and Clark, Dyer, and Bolinger, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

HURT, J. This conviction is for theft of a cow. Webb, the owner, lost the cow from the range about October 1, 1881. Crippen bought the cow from appellant and Jeff Metlock about October 1, 1883, at his butcher-pen in East Waco, McLennan County, and paid twenty dollars for her. He put her in his pen, and on the next day Webb came, claimed and took her away. He, Crippen, sent word to appellant and Jeff, and they came in and refunded the twenty dollars, stating that they had bought the cow from a negro named Smith, on the Rose farm, in McLennan County. This farm is five or six miles above Waco. They showed him (Crippen) a little piece of paper, on which a bill of sale was written. It seemed to have been torn out of a book.

The Matlocks drove the cow along a public road (the Dallas and Waco) to East Waco, and sold it to Crippen. While on the way, when asked where they got the cow, they said: "From a negro man." On or about October 1, 1883, the Matlocks drove the cow to and penned her at S. Matlock's, stating to him that they had bought her from a negro man named John Smith; appellant stating that he had given a pistol and three dollars for the cow, and he exhibited a bill of sale for the cow, the bill being written in a small book.

If the accused is found in possession of stolen property, and is called upon to explain, but fails so to do, it may be inferred—presumed—that he was the taker. But the possession must not be too remote, and if remote, the party in possession is not bound to explain at all; the rule being that the possession must be recent. And by all the opinions (says Mr. Bishop), the presumption that the party in possession was the taker diminishes in strength as the time increases between the theft and the possession. If the possession is very remote (yet how remote must depend upon the special nature of the case), the

judge, in his discretion, will exclude it as having no sufficient tendency to prove anything. Its remoteness depends upon the nature of the thing stolen. Is it such property as passes readily from hand to hand, or not? If, from the nature of the property, it would pass readily from one person to another, the possession, to have convictive strength, must be more recent than the possession of property which does not so pass: 2 Bishop's Crim. Proc., secs. 739, 745.

Applying these rules to the case in hand, we are of the opinion that the possession of the animal charged to have been stolen is too remote to call upon appellant for an explanation. Bearing upon this question, what are the facts? The cow was stolen about October 1, 1881. She was found in possession of appellant about October 1, 1883. Two years after the theft the animal is found in the possession of the appellant. Was this possession sufficiently recent to call for an explanation? We think not, nor do we think an authority can be found holding to the contrary: See *Willis v. State*, 24 Tex. App. 586.

But suppose we err in this conclusion. Appellant gave a reasonable and consistent account of his possession, which was not attempted to be contradicted or disproved by the state, except by evidence tending to show flight by the appellant and Jeff Matlock.

We are of opinion that the evidence is not sufficient to support this conviction, for which reason the judgment is reversed and the cause remanded.

POSSESSION OF STOLEN PROPERTY AS EVIDENCE OF GUILT: *Stockman v. State*, 24 Tex. App. 387; 5 Am. St. Rep. 894, and note 896; *Boyd v. State*, 24 Tex. App. 570; 5 Am. St. Rep. 908, and note 912; *State v. Jones*, 19 Nev. 365; *State v. Kirkpatrick*, 72 Iowa, 500.

STERLING AND MATLOCK v. STATE.

[25 TEXAS APPEALS, 716.]

ACCUSED WAIVES RIGHT TO CLAIM FORMER JEOPARDY where he makes a motion which substantially amounts to vacating a former judgment against him, and the court sets aside such judgment, notwithstanding the court, in addition to what is asked, does of its own motion award a new trial.

Monteith and Furman, and Harris and Saunders, for the appellants.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. Upon the first trial of these appellants under the indictment in this case, which was a joint trial, they were found guilty of a simple assault, but the verdict of the jury, instead of assessing the fine against each, assessed a joint fine against both. The judgment, however, not following the verdict, assessed and adjudged a separate fine against each. Three days after the rendition of this judgment the defendant filed a motion to have this judgment corrected so as to have it conform to the findings of the verdict; in other words, to have the court render a judgment assessing a joint fine against defendants, and which judgment would have been illegal and invalid: *Flynn v. State*, 8 Tex. App. 398.

This motion by defendants was tantamount to asking the court to vacate and set aside, absolutely, the judgment rendered, and substitute a wholly different one therefor. Treating it as such, the court—and we think properly—overruled the motion to substitute, but did set aside the judgment, and of its own motion, over the protest and objection of defendants, ordered a new trial. When the case was again called for trial, defendants pleaded former jeopardy and acquittal, by virtue of the facts we have stated; which special plea was stricken out on motion of the county attorney, and the parties again placed upon trial, over their objections, and again convicted. The question is, Was the plea a good one? and were the parties entitled to be discharged on account of the former proceedings had in the case?

The rule seems to be well settled that “if a defendant moves in arrest of judgment, or applies to a court to vacate a judgment already rendered, for any cause, and his motion prevails, he will be presumed to waive any objection to being put a second time in jeopardy, and so may ordinarily be tried anew”: Code Crim. Proc., arts. 20, 21; 1 Bishop’s Crim. Law, 4th ed., sec. 844; *Simco v. State*, 9 Tex. App. 338. Mr. Bishop says: “The test as to the effect of an imperfect verdict which has been received and recorded is, if it sufficiently finds anything, whether for or against the defendant, it will be interpreted by the court and judgment rendered on the one side or the other for what is thus found; otherwise it will be treated as null, the judgment arrested or be erroneous if rendered, and the defendant may be tried anew”: 1 Bishop’s Crim. Proc., 3d ed., sec. 1005; *Dubose v. State*, 13 Tex. App. 419. The same learned author, in a later work, treating of the procuring of a verdict or judgment to be vacated, says: “Whenever a verdict,

whether valid in form or not, has been rendered on an indictment, either good or bad, and the defendant moves in arrest of judgment or applies to the court to vacate a judgment already entered, for any cause,—as for many causes he may,—he will be presumed to waive any objection to being put a second time in jeopardy, and so he may ordinarily be tried anew. If the verdict against the prisoner is wrong, and it was produced by some error of the court to which he objected, a just view of the constitutional guaranty would permit him to have the error corrected without waiving his right to object to a second jeopardy. Still, the practice in most cases has been otherwise": 1 Bishop's Crim. Law, secs. 998, 999.

We are of opinion that in making the motion to vacate the former judgment against them, the defendants have, notwithstanding the court went beyond what they asked, and not only set it aside but awarded a new trial, waived their right to claim former jeopardy, and that the court did not err in holding that said plea did not present any defense, and should therefore be stricken out.

This being the only question in the case on this appeal, and believing that the ruling of the court below upon it is correct, the judgment is affirmed.

RIGHT NOT TO BE PUT IN JEOPARDY A SECOND TIME FOR SAME CAUSE is as sacred as the right of trial by jury, and is guarded with as much care by the common law and the constitution: *Dinkey v. Commonwealth*, 17 Pa. St. 126; 55 Am. Dec. 542. When accused is in jeopardy: See *Commonwealth v. Fitzpatrick*, 121 Pa. St. 109; 6 Am. St. Rep. 757, and note 760.

JONES v. STATE.

[26 TEXAS APPEALS, 1.]

SHERIFF HAS NO AUTHORITY IN TEXAS TO SERVE CAPIAS beyond the limits of his county.

HOMICIDE COMMITTED IN PREVENTING ARREST IS JUSTIFIABLE, even if the attempted arrest is lawful, where power to arrest is exercised in such a wanton and menacing manner as to threaten accused with loss of life or some bodily harm.

KILLING IN RESISTING AN ILLEGAL ARREST of ordinary character is manslaughter.

INSTRUCTIONS — SELF-DEFENSE. — WHERE DECEASED, ATTEMPTING ILLEGAL ARREST, made an unlawful attack upon accused, reasonably calculated to create in a man of ordinary mind a belief that deceased was about to inflict on him death or serious bodily injury, the right of accused to kill in such case is complete, whether he was or was not the person named

in a warrant which deceased had illegally attempted to serve, and a charge to the *contra* is erroneous.

INSTRUCTIONS. — HOMICIDE TO PREVENT UNLAWFUL ARREST IS JUSTIFIABLE if accused at the time believed, and had reasonable cause to believe, that he was being unlawfully arrested, that his life was in serious danger, and that the killing was necessary to prevent his unlawful arrest; and it is error to refuse instruction to that effect.

THE opinion sufficiently states the case, with the exception of the following charge, which was requested of the court: "I charge you that if Jim Jones, defendant in this case, believed, and had reasonable ground to believe, or for such belief at the time he shot the deceased, Tom Nowlin (if you find he shot him), that he, defendant Jim Jones, was being unlawfully arrested, that is, arrested without lawful authority, and that the life or person of him, defendant Jim Jones, was in immediate serious danger thereby, and the acts done by the defendant Jim Jones were necessary to prevent such unlawful arrest of him, the said Jim Jones, and without a resort to such extremity the unlawful arrest could not have been prevented, and the deceased had not in fact any lawful authority to make such arrest, then the homicide was in law justifiable, and you will acquit the defendant."

W. A. H. Miller, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

HURT, J. This is a conviction for murder in the second degree, with the penalty fixed at confinement in the penitentiary for twenty-four years.

The appellant, Jones, lived in San Saba County. Thomas H. Nowlin lived in, and was deputy sheriff for, Llano County.

The following *capias* was issued by the clerk of Jeff Davis County: —

"The State of Texas. To any sheriff of Texas, greeting." Then follows the command to arrest Jim Jones upon a charge by indictment for theft of cattle in Jeff Davis County. This *capias* came to the hands of Caldwell Roberts, sheriff of Llano County, who, on the fourth or fifth day before the homicide, gave it to Nowlin, his deputy, with orders to go and arrest the appellant.

On the fifth day of April, 1888, Nowlin, accompanied by Lee Peck, just after sunrise, went to the house of appellant to execute the *capias*. Jones and wife were in bed. Nowlin halloed. Jones, saying "he would be there in a moment," soon opened the door with a shot-gun in his hand.

Peck, relating the facts attending the homicide, testified: "Nowlin said, 'Jim, we have got a paper for you' (calling it by some name, I do not recollect what). Defendant said, 'That is all right; I thought it was a mob,' or 'damn mob.' He also said that some of the people around there had been accusing him of horse-stealing. Jones said, 'Let me see the papers.' Whilst the conversation was going on, Nowlin and myself had dismounted and walked up to the door. Nowlin said, 'Shall I read the paper, or shall you read it?' Defendant said he would read it. Defendant then took the paper from Nowlin, who handed it to him, and read until he got down to the words 'Jeff Davis County.' The word 'Jeff' was blotched, and defendant stepped up to Nowlin and asked him what it was. Nowlin told him, and defendant stepped back and read on a while, then suddenly raised his gun and fired. I saw him raising his gun. Nowlin commenced raising his pistol, and they both fired about the same time,—can't say which fired first. While defendant was reading the paper, Nowlin pulled out his pistol and held it down by his side. Don't think Jones saw Nowlin when Nowlin pulled out his pistol. Nowlin fired two shots,—the first so close together with Jones that I could not tell who fired first. Nowlin fired his second shot after he had fallen."

W. D. Wright, a witness for the state, testified that the pistol-shot was fired first. "I heard one pistol-shot before I heard the shot-gun, and one pistol-shot after." "I heard the first pistol-shot from one to one and a half seconds before I heard the shot-gun. I heard the second pistol-shot from three to to four seconds after I heard the shot-gun." "Defendant was wounded slightly in the shoulder." "I am a brother-in-law of Jones." "I was about one hundred and ten steps from defendant's house when the shots were fired."

The wife of defendant testified that she and her husband were in bed when the parties came to the house; that she waked her husband and remained on the bed when he went to the door. "Nowlin handed the defendant a paper, and he read a part of it, and said to Mr. Nowlin: 'Tom, here is a word I can't make out.' Mr. Nowlin said he could. Defendant then stepped one step, and handed the paper to Nowlin. Defendant stepped back one step and Nowlin finished reading the paper. Defendant was standing, and had been all the time, with his gun in his right hand, holding it about the lock, the muzzle resting on his foot. When Mr. Nowlin finished read-

ing the paper, defendant spoke and said, 'Tom, I will not go with you.' As defendant said that, Mr. Nowlin said, 'You won't?' and threw his pistol up and fired, hitting defendant on the shoulder. As soon as defendant could, he threw his gun up with his right hand and fired. At the firing of defendant's gun I jumped out of bed, and just after I did so Mr. Nowlin fired a second shot."

Henry Birdwell testified that he heard the three shots,—two rifle or pistol shots and one a shot-gun,—the pistol or rifle shot first, then the shot-gun, and then the rifle or pistol again. He was about a mile and a quarter from defendant's house.

In his dying declarations the deceased stated that the defendant fired first, but that the shots were almost together. The above is a sufficient statement of the facts to present the points raised on the charge of the court.

At common law, a sheriff has no jurisdiction beyond the borders of his county. The constitution of this state provides for this officer, giving to the legislature the right to prescribe his duties. We have searched the statutes carefully, but find no act giving jurisdiction to the sheriff to serve a *capias* beyond the limits of his county. Hence the attempted arrest in this case was unlawful.

What, therefore, are the rules of law applicable to a homicide committed in the prevention of an illegal arrest?

1. Whether the arrest be legal or not, the power to arrest may be exercised in such a wanton and menacing manner as to threaten the accused with loss of life or some bodily harm. In such a case, though the attempted arrest was lawful, the killing would be justifiable.

2. "Though a man will not be justifiable, then, if he kill in defense against an illegal arrest of an ordinary character (not such as is mentioned in the first rule), yet the law sets such a high value upon the liberty of the citizen that an attempt to arrest him is esteemed a great provocation, such as will reduce a killing in the resisting of such an arrest to manslaughter. This principle is declared in *Noles v. State*, 26 Ala. 31, and *Commonwealth v. Drew*, 4 Miss. 391; and is well established both in England and in this country": *Rex v. Curvan*, 1 Moody C. C. 132; *Buckner's Case*, Style, 467; *Tooley's Case*, 2 Ld. Raym. 1296; 1 Hale P. C. 457; Foster, 312, sec. 9; *Regina v. Phelps*, 1 Car. & M. 180; *Stockley's Case*, 1 East P. C. 310; *Ferris's Case*, C. C., sec. 71; *Roberts v. State*, 14 Mo. 146; *Rex v. Thompson*, 1 Moody C. C. 80; *Commonwealth v. Carey*, 12 Cush. 246;

State v. Oliver, 2 Houst. 604; *Tackett v. State*, 3 Yerg. 392; 24 Am. Dec. 582; *Galvin v. State*, 6 Cold. 291.

Testing the charge of the court by these rules, it will be found clearly wrong, because it fails to submit to the jury these principles of law for their guidance in determining whether the defendant was guilty at all, and if guilty, of what grade of offense.

In one paragraph of the charge appellant's right of self-defense is made to hinge upon whether he was the person named in the *capias*, and the further fact that deceased was making or had made an unlawful attack upon him, reasonably calculated to create in a man of ordinary mind a belief that deceased was about to inflict on him death or serious bodily harm. We think that the appellant's right to kill would be complete under the above state of case, whether he was the person named in the warrant or not.

The first charge requested by counsel for appellant was substantially correct, and should have been given. The court should have submitted to the jury the principle of law contained in the rules above given. This was absolutely required by the facts of the case.

There are other matters contained in the record of a very serious character, but as they will not occur on another trial, they will not be noticed.

The judgment will be reversed and the cause remanded.

HOMICIDE, WHEN JUSTIFIABLE IN RESISTING UNLAWFUL ARREST: *Creighton v. Commonwealth*, 83 Ky. 142; 4 Am. St. Rep. 143, and note 147. If a dwelling-house is actually broken and entered by a portion of a party combined and armed for the unlawful purpose of depriving one of the inmates of his liberty, and carrying him away in the night-time, accompanied with an intent to commit a felony, the person thus assaulted, as well as the owner of the dwelling, may resist with such force as may be necessary, even to taking the life of those present aiding and assisting, as well as those actually breaking and entering: *Wright v. Commonwealth*, 85 Ky. 123.

DOUGLASS v. STATE.

[26 TEXAS APPEALS, 109.]

INSTRUCTION—VARIANCE—EVIDENCE IS SUFFICIENT TO SUSTAIN ALLEGATION IN INDICTMENT FOR ASSAULT WITH INTENT TO COMMIT MURDER, where indictment is not required to set forth the means and weapon used, and the assault is alleged to have been committed "with a gun," but the testimony shows that the weapon used was "a pistol"; and an instruction, in substance that conviction might be had if assault as charged was committed with a gun or pistol, is correct.

Simmons and Crawford, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. Appellant was indicted, tried, and convicted in the lower court for assault with intent to murder. "An indictment for assault with intent to murder need not set forth the means used, nor the manner in which the means were used, to effectuate the murderous intention": *Price v. State*, 22 Tex. App. 110, and many authorities cited. In this case, however, the pleader has set forth and alleged in the indictment that the assault was committed "with a gun, the same being a deadly weapon." The testimony showed that the weapon used by the defendant was a pistol, and the court instructed the jury, in substance, that if the assault as charged was committed with a gun or pistol, they should convict. It is insisted that this instruction was erroneous, and that there is a fatal variance between the allegation and proof in this particular.

At common law, in an indictment for murder it was necessary to allege the means or weapon used: 1 East P. C. 341; and such allegation is requisite in an indictment for murder in this state: Willson's Criminal Forms, No. 388, p. 173, and authorities cited. But when the indictment is required to contain such an allegation, Mr. Bishop says: "This is one of the cases in which proof of only the substance of the issue is required. Though at the trial the weapon appears not to have been the same as charged, yet to have produced the same sort of wound which it would have done, followed by the same sort of death, the averment is sustained": 2 Bishop's Crim. Proc., 3d ed., sec. 514.

Mr. Wharton says: "The common-law rule in pleading the instrument of death is, that where the instrument laid and the instrument proved are of the same nature and character, there is no variance; where they are of opposite nature and

character, the contrary": 1 Wharton's Crim. Law, 8th ed., sec. 519.

"If the act of the prisoner and the means of death be proved in substance as alleged, the violence and death being of the same kind as alleged, a mere variance in the name or kind of instrument used will not be material (Bulst. 87) if the instrument was capable of producing the same kind of death: 9 Coke, 67 a; Gilbert's Ev. 231; 1 Archbold's Crim. Pr. & Pl., 8th ed., Pomeroy's notes, note on p. 280. Many other authorities might be cited, but these are deemed sufficient, and they amply sustain the charge of the court and the sufficiency of the proof to sustain the allegation as to the means laid in the indictment by which the assault was committed. There is no substantial or material variance.

Other questions are presented by appellant, but they are not deemed of sufficient importance to require discussion. We have found no reversible error, and the judgment is affirmed.

SUFFICIENCY OF INDICTMENTS FOR MURDER: *Schaffer v. State*, 22 Neb. 557; 3 Am. St. Rep. 274, and note 279-284.

GRIFFIN v. STATE.

[26 TEXAS APPEALS, 157.]

IN IMPEACHING WITNESSES, the following rules apply: first, the inquiry must be restricted to the general character of the party sought to be impeached; second, that the impeaching witnesses must speak from general reputation, and not from their private opinions, as to whether the character of the impeached witness is good or bad for truth, or as to whether the general reputation of the impeached witness is such as to entitle him to credit on oath.

INSTRUCTIONS ON MURDER TRIAL SHOULD DEFINE MALICE.

Crosson and Holshausen, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

HURT, J. This conviction is for murder in the second degree, with the punishment fixed at confinement in the penitentiary for five years.

The record contains the following bill of exceptions: "The state placed upon the stand Frank Waters, who testified that, a short while before the killing of Van Chambers, the defendant told him, as he, the defendant, was on his way to attend a party that night, that he was going to the party expecting

to find the deceased, Van Chambers, there, and if he could get him, the said Chambers, out by himself he would kill him. The defendant thereupon introduced eighteen or twenty witnesses to impeach the said witness, Waters, by showing that the general reputation of the said Waters for truth and veracity in the neighborhood was bad, and from that reputation, the said Waters was not entitled to be believed under oath.

"The state then introduced some ten or more witnesses to sustain the reputation of said Waters, among others Dave Ballow, Polk Snow, D. S. Chandler, T. J. Epperson, W. J. Wakefield, and L. F. Gerlock, to whom the state asked this question: 'Do you know the witness Frank Waters?' They said, 'Yes.' 'Are you acquainted with his reputation for truth?' They said, 'Yes,' and that it was good. On cross-examination, they were asked by defense, 'Did you ever hear his reputation for truth discussed?' They said, 'Never until yesterday.'

"The state then asked each of said witnesses: 'Have you ever heard the reputation of the said Waters for truth and veracity impeached or impugned before this?' To which the defendant, by counsel, objected, because the question was improper, and not confined to the knowledge of said witnesses as to the general reputation of the said Waters in the neighborhood or community where he lives. The objection was overruled, and the defendant excepts to the ruling.

"The state then asked each of the following witnesses [naming seven], 'Are you acquainted with the reputation of the witness Waters for truth and veracity?' which being answered in the affirmative, they were further asked if it was good or bad; which being answered 'Good,' they were further asked if he, the said Waters, was entitled to be believed under oath; to each and all of which said questions the defendant excepted, because they were not proper in determining the general reputation of said witness in the neighborhood where he lives for truth and veracity, and was permitting the witnesses to testify, not as to the general reputation of Waters for truth and veracity, but as to their own opinion and belief; which objection was overruled by the court, and to which defendant excepted."

Two objections were made to the questions and answers: 1. That the witnesses did not state that they were acquainted with Waters's general reputation in the neighborhood in which he then lived; 2. That the witnesses were induced to and did state their opinion as to whether he was entitled to credit, not

from his general reputation for truth, but from their own knowledge or opinion of the witness.

This question is very elaborately discussed by Justice Bell in *Boon v. Weathered*, 23 Tex. 675. He states the rule to be, "That the inquiry should practically be restricted to the general character of the impeached witness for truth. . . . If the impeaching witness states that he is acquainted with the general reputation of the impeached witness for truth in the community where he lives, he may then properly be asked whether that general reputation is such as to entitle the witness to credit on oath. . . . Any other form of words may be used which do not involve a violation of the cardinal principles that the inquiry must be restricted to the general reputation of the impeached witness for truth in the community where he lives or is best known; and that the impeaching witness must speak from general reputation, and not from his own private opinion."

We are of the opinion that the questions propounded to the impeaching witnesses were not calculated to, nor did they, elicit the proper answers; that the questions and answers were violative of the cardinal principles governing this subject. First, the inquiry must be restricted to the general character of the party sought to be impeached; second, that the impeaching witnesses must speak from general reputation, and not from their private opinions, as to whether the character of the impeached witness is good or bad for truth; or as to whether the general reputation of the impeached witness is such as to entitle him to credit on oath.

There is no venue proved by direct or circumstantial evidence.

We call the attention of the learned trial judge to the fact that malice is not defined to the jury. As to the necessity of defining malice, see *Jones v. State*, 5 Tex. App. 397; *Tooney v. State*, 5 Id. 163; *Pharr v. State*, 7 Id. 472; *Harris v. State*, 8 Id. 90; *McKinney v. State*, 8 Id. 627; *Hayes v. State*, 14 Id. 330.

The judgment is reversed and the cause remanded.

IMPEACHMENT OF PARTY'S OWN WITNESS on ground of surprise: *Bennett v. State*, 24 Tex. App. 73; 5 Am. St. Rep. 875, and note 878.

TO IMPEACH WITNESS BY PROOF THAT ANOTHER WITNESS WOULD NOT BELIEVE FORMER ON OATH, the latter must first testify that he knows the former's reputation among his neighbors for truth and veracity, and that such reputation is bad: *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320; see *Holland v. Barnes*, 53 Ala. 83; 25 Am. Rep. 595; *Holbert v. State*, 9 Tex. App. 219; 35 Am. Rep. 738.

HENDRICKS v. STATE.

[26 TEXAS APPEALS, 176.]

ORDER FOR MERCHANDISE MAY BE THE SUBJECT OF FORGERY.

INDICTMENT WHICH SETS OUT INSTRUMENT ALLEGED TO BE FORGED IS VALID AND SUFFICIENT WITHOUT INNUENDO OR EXPLANATORY AVERMENTS as to words "bare" and "grosses," used therein, where said instrument reads: "Please let Bare Have the sume of \$5 Dollars in Grosses and charge the same to," and is signed; such instrument is neither incomplete, unmeaning, nor unintelligible.

J. W. Parker, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. As set forth in the indictment, the instrument alleged to have been forged is in these words, viz.:—

"Prescriptions a Specialty.

"TAYLOR, TEXAS, 188..

"M.

"Bought of DR. F. T. COOK,

"Drugs, Medicines, Toilet Articles, Books, Jewelry, etc.

"All bills due first each month."

"Mr. Goldstone Please let Bare Have the sume of \$5 Dollars in Grosses and charge the same to DR F T COOK."

An order for merchandise may be the subject of forgery: *Peete v. State*, 2 Lea, 513; *United States v. Book*, 2 Cranch C. C. 294; *United States v. Brown*, 3 Id. 268; *State v. Morgan*, 35 La. Ann. 293; *State v. Ferguson*, 35 Id. 1042; *Horton v. State*, 53 Ala. 488; *Anderson v. State*, 65 Id. 553; *Burke v. State*, 66 Ga. 157; *State v. Keeter*, 80 N. C. 472; *People v. Shaw*, 5 Johns. 236; *Commonwealth v. Fisher*, 17 Mass. 46; *Rollins v. State*, 22 Tex. App. 548; 58 Am. Rep. 659; *Keeler v. State*, 15 Tex. App. 111. "It is not merely a request for the delivery of property, but is a writing obligatory promising to pay for property. . . . Such a promise is clearly implied in the clause, 'and charge the same to me,' for it would be unreasonable to assert that where a person asks the value of property furnished on his order to be charged against him, he intends that the charge shall be a mere idle and senseless form": *Garmire v. State*, 104 Ind. 444; 5 Am. Crim. Rep., Gibbons, 238.

The second ground urged in defendant's motion in arrest of judgment is, that "the said instrument of writing set out in the indictment is of doubtful and uncertain validity, and is not apparently good on its face, and there are no averments in

the indictment showing said instrument to be effectual as a pecuniary obligation." As otherwise stated in appellant's proposition on his second assignment of error, the position assumed is, "that the instrument set out in the indictment is of doubtful and uncertain meaning on its face, and there are no innuendo averments in the indictment showing it to be valid and effectual as a pecuniary obligation; and therefore it does not appear from the indictment that an offense against the law was committed. . . . There are no innuendo averments whatever in the indictment explanatory of the said instrument." The sole question for our decision on this appeal is, whether the indictment is valid and sufficient without innuendo or explanatory averments as to the words "bare" and "grosses," used in the alleged forged order.

"It is an established rule that a written instrument, to be the subject of indictment for forgery, must be such as would be valid, if genuine, for the purpose intended. If void or invalid upon its face, and it cannot be made good by averment, the crime of forgery cannot be predicated upon it. In other words, if the instrument is absolutely void upon its face, it cannot be made the subject of forgery; but if the legality be doubtful, and by proper allegations its legality is capable of being shown to the court, it is a subject of forgery": *Rollins v. State*, 22 Tex. App. 548; 58 Am. Rep. 659; *Anderson v. State*, 20 Tex. App. 595; *State v. Briggs*, 34 Vt. 503.

It seems to be an equally well-settled rule that "a writing so imperfect and obscure that it is unintelligible without reference to extrinsic facts will not support an indictment for forgery unless those facts are averred, and by the averment it is made apparent that it has the capacity of effecting fraud": *Hobbs v. State*, 75 Ala. 1.

In *Rembert v. State*, 53 Ala. 467, 25 Am. Rep. 639, which is the most able discussion of the question we have seen, the court say: "The fact that the paper is incomplete or imperfect in itself, and that without the knowledge of extrinsic facts it does not appear that it has the vicious capacity, only renders it necessary that the indictment should aver the extrinsic facts. In all indictments for forgery at common law, it was necessary to set out the instrument, so that it would judicially appear to the court that it was the subject of forgery. When the instrument is complete, perfect, and not void on its face, and when it is spoken of as void, illegal in its very frame, or innocuous from its character, as in the case of the will not

properly attested, or the void bill of exchange, or the certificate worthless as evidence, or the deed void because of the incapacity of the grantor, its criminal character was disclosed to the courts. When the instrument is imperfect, incomplete, and its real meaning and terms are not intelligible from its words and figures, but are to be derived from extrinsic facts, then, when such facts are averred, and the instrument, its meaning, and purport made intelligible to the court, it appears judicially with as much certainty as if the extrinsic facts were on the face of the instrument, and that set out *in hæc verba*, whether it has the vicious capacity, and is the subject of forgery." Again, it is said in the same case: "Courts are very reluctant to pronounce written instruments void for mere uncertainty."

In a recent case in Indiana it was held that "where an indictment for perjury, the instrument on which the forgery is predicated is set out without the averment of extrinsic facts explaining it, and it is so uncertain in its terms that it is impossible to tell whether it would or would not, if genuine, operate as the foundation of another's liability or rights, or have any legal effect whatever, the indictment is bad, on motion to quash for not stating the offense with sufficient certainty: *Shannon v. State*, 109 Ind. 407.

Mr. Bishop says: "If a writing is so incomplete in form as to leave an apparent uncertainty in law whether it is valid or not, a simple charge of forging it fraudulently, etc., does not show an offense; but the indictment must set out such extrinsic facts as will enable the court to see that if it were genuine it would be valid. When such extrinsic circumstances are set out, and also proved at the trial, the defendant may be convicted, while without them he must be discharged": 2 Bishop's Crim. Law, 7th ed., sec. 545.

Mr. Wharton says: "Where an instrument is incomplete on its face, so that as it stands it cannot be the basis of any legal liability, then, to make it the technical subject of forgery, the indictment must aver such facts as will invest the instrument with legal force. . . . But if the meaning of the transaction can be sufficiently extracted from the instrument itself, it will not be necessary to state matters of evidence so as to make out more fully the charge": 1 Wharton's Crim. Law, 8th ed., sec. 740.

Applying these principles of law to the validity of the instrument set out in the indictment, and copied above, both

with reference to its being a subject of forgery and being sufficiently averred in the allegations of the indictment, without any explanations of its terms in the light of extrinsic facts, it seems clear to our minds that the indictment is sufficient, and is not liable to the objections urged, and that the motion in arrest of judgment was properly overruled. On its face, the instrument was an order for merchandise or goods, or property of some kind, and no explanation or averment of extrinsic facts was necessary to show that such was its character. Such an instrument, we have already seen, may be the subject of forgery. It is evidently an order for five dollars' worth of something. What that something was we may not know; but we do know that it was property having value, and though not known to us, might doubtless have been as well known to defendant, to Dr. Cook, to Goldstone, the drawee, and to thousands of others, as is the word "groceries" known to the commercial world. If Goldstone, the drawee, had filled and taken up this order, and it had been the genuine act of Cook, there can be no question but that Cook would have been liable to him for the five dollars. The instrument as set out is neither incomplete, unmeaning, nor unintelligible, and needed no explanation to make it the subject of forgery.

No reason has been made to appear why the judgment of conviction in this case should be set aside, and it is therefore affirmed.

WHAT MAY BE THE SUBJECT OF FORGERY. — The following note is intended as the complement of the note to *Arnold v. Cost*, 22 Am. Dec. 306, where this question is considered somewhat at length. The rule "seems to be that the writing or instrument which may be the subject of forgery must generally be, or purport to be, the act of another, or it must at the time be the property of another, or it must be some writing or instrument under which others have acquired some rights, or have become liable in a certain way, and where these rights or liabilities are sought to be affected or changed by the alteration without their consent": *State v. Young*, 46 N. H. 266. It must also be such an instrument as, if genuine, would injure another, or defraud or deceive another: *State v. Briggs*, 34 Vt. 501; *Commonwealth v. Hinds*, 101 Mass. 209, 210; *People v. Galloway*, 17 Wend. 540; *People v. Ferris*, 56 Cal. 442, 445; *People v. Tomlinson*, 35 Id. 503; *Rollins v. State*, 22 Tex. App. 548; *Williams v. State*, 24 Id. 342, 345; although it is not necessary that the forged instrument should be available: *People v. Frank*, 28 Cal. 507, 514; or that the instrument should have actual legal efficacy, it is sufficient that, if genuine, it might have such apparent efficacy: *State v. Johnson*, 26 Iowa, 407; 96 Am. Dec. 158. "Hence all contracts, bonds, and instruments in writing which create a legal liability from one person to another that may be enforced at law are properly the subjects of forgery": *State v. Briggs*, *supra*. But, as is said in *State v. Boasso*, 38 La. Ann. 202, "it is not essential that

the forged instrument be one such that, if genuine, an action might be brought on it. If it could be used as proof in a suit, either against him whose name is forged, or in a suit against any other, whether to sustain a claim made or in defense of one, it is susceptible of forgery": *Id.* 207, citing 1 Wharton's Crim. Law, secs. 691, 692; nor is it necessary "that the subject of forgery be shown to be a complete executory contract expressing a consideration. Instruments of evidence by which a contract is proved may be forged just as well as the contract itself, if wholly expressed in writing. . . . Where a forged instrument is not void on its face, but only incomplete or uncertain, extrinsic evidence may be introduced showing its validity. Such an incomplete instrument may be the subject of forgery": *In re Benson*, 34 Fed. Rep. 649, 653, 654.

THE FOLLOWING INSTRUMENTS HAVE BEEN DECIDED TO BE SUBJECTS OF FORGERY: A mortgage: *People v. Sharp*, 53 Mich. 523; *People v. Caton*, 25 Id. 388; a copy of a decree of divorce certified by the clerk, and attested by the seal of the court: *Ex parte Finley*, 66 Cal. 262; an instrument under which a mortgage is released and canceled, payment thereof being acknowledged, and which quitclaims the premises: *Meserve v. Commonwealth*, 137 Mass. 109; an indorsement of a promissory note: *Poage v. State*, 3 Ohio St. 229; an indorsement or receipt made by the maker in the presence, with the concurrence, and by the direction of the payee on the back of a note, of the payment of money on account on the note, although such indorsement is not signed: *Kegg v. State*, 10 Ohio, 75; a receipt for money, as where the word "part" is erased, and the words "full up to date" are inserted: *State v. Floyd*, 5 Strob. 58; 53 Am. Dec. 689; a receipt for money paid on account: *Allen v. State*, 79 Ala. 34; a bill of costs for jail fees required to be made out by the sheriff to obtain amount from the state: *Fonte v. State*, 15 Lea, 712; a bill of costs of a justice of the peace required to be certified to entitle him to receive his costs from the county or state in criminal cases: *Luttrell v. State*, 1 Pickle, 232; a school warrant: *Crain v. State*, 45 Ark. 450; a county warrant, it being a writing by which the money or property or rights of a county can be affected in a manner to its loss and injury: *State v. Fenley*, 18 Mo. 445, 450; *Garner v. State*, 5 Lea, 213; a book-account: *Barnum v. State*, 15 Ohio, 717; 45 Am. Dec. 601; a city assessment roll is such a book-account: *Turbeville v. State*, 56 Miss. 793; books of a national bank, as in case the teller alters them: *Commonwealth v. Luberg*, 94 Pa. St. 85; a teacher's school certificate of qualification: *State v. Grant*, 74 Mo. 33; a recorder's certificate of record of a deed, although it fails to name the year in which it was deposited for record: *State v. Tompkins*, 71 Mo. 613, 616; a certificate of indebtedness purporting to be issued by another state, where that state has authority to issue such certificates: *People v. Brie*, 43 Hun, 317; a certificate of acknowledgment of power of attorney purporting to have been executed in another state: *People v. Marion*, 29 Mich. 31; a certificate of indebtedness issued by the council and mayor of a city: *Bishop and Helm v. State*, 55 Md. 138; a marriage certificate, although no marriage ever existed: *State v. Boasso*, 38 La. Ann. 202, 206; a certificate of a justice of the peace authenticating the presentation and counting of gopher scalps, for which a bounty has been offered by the board of supervisors, which is to be received by such board as a legal proof of such counting for the purpose of issuing warrants to pay the bounty claimed: *State v. Johnson*, 26 Iowa, 407; 96 Am. Dec. 158; a railroad pass: *State v. Weaver*, 84 N. C. 836; 55 Am. Rep. 647; a bail bond for appearance of a party before a court: *Costley v. State*, 14 Tex. App. 156; an undertaking in writing to pay the debt of another, as the following:

"Mr. Bostick, charge J. S. Humphreys account to us," and signed: *State v. Humphreys*, 10 Humph. 442; a printed theater ticket, which contains nothing upon its face to proclaim it void, and which is in the usual form of such instruments: *In re Benson*, 34 Fed. Rep. 649; a condition made at the same time and on the same paper as a promissory note is forgery where fraudulently detached: *State v. Stratton*, 27 Iowa, 420; 1 Am. Rep. 282; "an order, a letter, or a mere license": *People v. Stearns*, 21 Wend. 409; an order or request for the delivery of property, although such instrument is not addressed to any one: *Noakes v. People*, 25 N. Y. 380, 382; an instrument in writing which purports to be signed by the proper authority that a certain number of pounds of cotton have been picked is such an order for the payment of money as to be the basis of a prosecution for forgery: *State v. Jefferson*, 39 La. Ann. 331; an instrument which reads: "Due 8.50 c, J. D.": *Nelson v. State*, 82 Ala. 44; an order "to let bearer trade ten dollars out of your store": 5 Day, 250; an order for merchandise, where such instrument is one by which a pecuniary demand or obligation purports to be created: *Allen v. State*, 74 Ala. 557; a postal money-order: *Ex parte Hibbs*, 26 Fed. Rep. 421, 431-435; an order to one person to pay money to another; nor is it necessary that a definite sum of money be specified in the order: *Wright v. State*, 79 Ala. 262; an order or draft to pay money to bearer, although it names neither drawee nor payee; "it is not necessary that the order should possess all the requisites of a bill of exchange": *State v. Bauman*, 52 Iowa, 68, 70; *People v. Brigham*, 2 Mich. 550, 555; a paper which reads, "Mr. Reed, pay L. Johnson for corn, gross —, tare —, net —, bu. —, at — cts., \$35.75. M. Reed, per J. H. R., weigher," although such instrument is partly printed and partly written: *State v. Lee*, 32 Kan. 360; a written order which reads: "Halls and Davisons, please let this boy have a root of cloth, (signed) Mrs. Wilson, and let him have a cap too": *Stewart v. State*, 113 Ind. 505; an instrument which reads: "Prime Wingard 507, I. cot T T P": *State v. Wingard*, 40 La. Ann. 733, — since such instruments as the above were in a form which apparently had some legal efficacy. One's signature may be forged by making a writing over it which, if genuine, would possess legal efficacy, and which, although not genuine, may operate to the prejudice of another's rights: *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760. There may be a forgery of an "undertaker's certificate," and a "clergyman's certificate," used to obtain payment of money on a life insurance policy. It was said by the court in this case that "the contention of counsel for defendant is, that the making of the affidavit of the undertaker and the certificate of the attending clergyman could not in this instance be forgeries, and in support thereof cite the rule of criminal law, that an instrument void upon its face cannot be the subject of forgery, because it has no legal tendency to effect a fraud. In support of this contention, it is claimed that the affidavit and certificate were a part of the 'official notice and proof of death,' and that all the papers constitute only one instrument; that other recitations in the instrument are so repugnant and irreconcilable to those set forth in the affidavit of the undertaker and the certificate of the clergyman that the whole death proof is a mere nullity, and absolutely void upon its face. The claim of counsel is more plausible than sound. We concede that a writing invalid on its face cannot be the subject of forgery, but a false instrument which is good on its face may be legally capable of effecting a fraud, though inquiry into extrinsic facts would show it to be invalid, even if it were genuine; therefore the forging such an instrument would be a crime. . . . The papers headed 'Official notice and proof of

death 'embrace several separate and complete documents or written instruments. . . . The undertaker's affidavit and clergyman's certificate as executed are complete and separate instruments, and are not defective or in any way invalid on their faces. It is true that all these separate and independent instruments are necessary to complete the proof of death. . . . We do not think that where a certain number of written instruments are required to be presented in connection with each other as indispensable to establish an alleged fact, that a person who falsely and fraudulently makes one or more of these written instruments is guiltless of offense, because he does not falsely make all, or because in some of the other written instruments to be presented a discrepancy or defect occurs which prevents the accomplishment of his fraudulent purpose. The undertaker's affidavit and the clergyman's certificate are in the exact form required, and we think are the subject of forgery within the terms of the statute": *State v. Hilton*, 35 Kan. 338, 347-349. A ballot which is changed by a paster so as to read for a different candidate than the one for whom it is cast is a forgery: *Kreitz v. Behrensmeyer*, 125 Ill. 141; *ante*, p. 349.

THE FOLLOWING INSTRUMENTS HAVE BEEN DECIDED NOT TO BE SUBJECTS OF FORGERY: An instrument or writing invalid or void on its face: *John v. State*, 23 Wis. 504; *State v. Wheeler*, 19 Minn. 98; 5 Lawson's Criminal Defenses, 25; *Fadner v. People*, 33 Hun, 240, 245; 5 Lawson's Criminal Defenses, 34; *Cunningham v. People*, 4 Id. 455; *People v. Shall*, 9 Cow. 778; *People v. Harrison*, 8 Barb. 560; *Hobbs v. State*, 75 Ala. 1, 5; 1 Wharton's Criminal Law, secs. 696 et seq.; 2 Bishop's Criminal Law, sec. 544; *State v. Briggs*, 34 Vt. 501, 503; *Rembert v. State*, 53 Ala. 467, 469; such as a writing which reads "2 hides \$4⁰⁰/₁₀₀ Sitman," and is addressed to no one: *Howell v. State*, 37 Tex. 591. This rule is, however, subject to the limitation that "when the paper on its face does not appear to have any legal validity, or show that another might be injured by it, but extrinsic facts exist by which the holder of the paper might be enabled to defraud another, then such facts must be averred, and if averred in the indictment, will constitute the crime of forgery": *State v. Briggs*, 34 Vt. 501; *Hobbs v. State*, 75 Ala. 1, 5; *Rembert v. State*, 53 Ala. 467, 469. This is further qualified by the court in *Rollins v. State*, 22 Tex. App. 548, 551, where it is said: "We are not to be understood as holding that all instruments though not absolutely void can be made the predicate for forgery simply by allegations in the indictment. The instrument, by an inspection of it alone, independent of extrinsic matters or explanatory pleading, must by its very terms, figures, and marks appear to be that which by proper allegations it is made to be." An engrossed copy of a senate bill of any session in the state of California prior to 1862 is not such a public record that the alteration thereof is punishable by law as a crime: *In the Matter of Corryell*, 22 Cal. 179. A probate judge's memorandum-book, which is not required by law to be kept, but is used merely as a convenient book of reference in which entries are kept, and various minutes which could only be made intelligible by oral testimony, is not the subject of forgery; it is not a book "of or belonging to any public office," and has no official character: *Downing v. Brown*, 3 Col. 590; one's own book of accounts is not the subject of forgery: *State v. Young*, 46 N. H. 266; 5 Lawson's Criminal Defenses, 43; nor is a military land warrant, within an act which enumerates an "indent" and "public securities" as subjects of forgery: *United States v. Irwin*, 5 McLean, 178; so there can be no forgery in Nebraska of a deed of a married woman which is void without acknowledgment in the state where executed: *Roode v. State*, 5 Neb. 174; 25 Am. Rep. 475; nor is an inchoate bill

of exchange a subject of forgery: *Regina v. Harper*, 14 Cox, 574; 5 Lawson's Criminal Defenses, 23; nor can forgery be predicated of an instrument which does not on its face purport to be a copy of the record, and such as, if genuine, would be effective, such as a fictitious decree of divorce procured in another state: *Brown v. People*, 86 Ill. 239; 29 Am. Rep. 25; 5 Lawson's Criminal Defenses, 31; nor can it be predicated on a writing which reads: "Pay to John Low or bearer fifteen hundred dollars in N. Myers's bills or yours," it not being an order for the payment of money or the delivery of goods: *People v. Farrington*, 14 Johns. 348; nor of the following: "Let the bearer have one of your smallest with load and charge to me," and signed, it not being an order for the delivery of a pistol, as urged by the prosecution, or of goods or chattels: *Carberry v. State*, 11 Ohio St. 410; so a contract in writing for the purchase of a marble monument and its delivery at a future day is not an "instrument in writing" within the intent of the Illinois criminal code, and is not therefore a subject of forgery: *Shirk v. People*, 121 Ill. 61, 66; and a letter written to another introducing a party named therein, and recommending the loan of money to him, is not a writing of which forgery could be committed: *Foulkes's Case*, 2 Rob. 836; so wrappers of baking powders are not a subject of forgery: *Regina v. Smith*, Dears. & B. 566; 5 Lawson's Criminal Defenses, 17; nor is a painting a document or writing of which forgery may be committed: *Rez v. Closs*, Dears. & B. 460; 5 Lawson's Criminal Defenses, 12; and see generally the note in 5 Id. 67 et seq.

FORGERY — INDICTMENT, SUFFICIENCY OF: *State v. Johnson*, 26 Iowa, 407; 96 Am. Dec. 158; *Cross v. People*, 47 Ill. 152; 95 Am. Dec. 474; *State v. Morton*, 27 Vt. 310; 65 Am. Dec. 201; *Rembert v. State*, 53 Ala. 467; 25 Am. Rep. 639; *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760, and note 765.

HARMES v. STATE.

[26 TEXAS APPEALS, 190.]

HOUSE IS NOT DISORDERLY WITHIN INHIBITION OF STATUTE BECAUSE PROSTITUTES AND VAGABONDS RESORT THERE TO BUY AND DRINK BEER, it appearing that accused was engaged in carrying on a legitimate business.

DEFENDANT was the keeper of a grocery store and beer saloon combined, in which groceries or beer were sold to all persons who desired to purchase. Beer was sold to be drank on the premises, and the purchasers were permitted to remain as long as they wished. Respectable people of both sexes were customers of the store, and prostitutes resorted to the place daily to purchase groceries, or to purchase and drink beer. The rules of the house required that noisy and turbulent persons be expelled therefrom, and this rule had been enforced on one occasion. From a conviction and fine for keeping a disorderly house defendant appealed.

R. D. Harrell, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

HURT, J. This court, in *McElhenny v. State*, 12 Tex. App. 231, held that "it is not every house to which prostitutes and vagabonds resort that thereby becomes a disorderly house within the meaning and intent of article 396 of the Penal Code." In this case, as in that cited, the evidence shows that defendant was engaged in carrying on a legitimate business. That prostitutes and vagabonds resorted to that house for the purpose of buying and drinking beer does not bring the place within the inhibition of the statute.

Because the evidence does not warrant the conviction, the judgment is reversed and the cause remanded.

HOUSE IS DISORDERLY which tends to public annoyance, although but one person may actually have been disturbed: *Commonwealth v. Hopkins*, 133 Mass. 381; 43 Am. Rep. 527. And a canvas tent may be a "disorderly house": *Killman v. State*, 2 Tex. App. 222; 28 Am. Rep. 432. And under an indictment at common law for keeping a "disorderly house," it is no variance that the defendant kept only a single room: *Commonwealth v. Bulman*, 118 Mass. 456; 19 Am. Rep. 469. But an indictment for keeping a disorderly house, to the damage and common nuisance of all the citizens of the state, is bad, if it does not show particularly that the house was in a public place, or that the public were affected thereby: *Mains v. State*, 42 Ind. 327; 13 Am. Rep. 364. It has been held sufficient to constitute the offense of keeping a disorderly house that the house be so kept as to draw together idle, vicious, dissolute, or disorderly persons, engaged in unlawful or immoral practices, endangering the public peace, and promoting immorality: *Thatcher v. State*, 48 Ark. 56.

PHILLIPS v. STATE.

[26 TEXAS APPEALS, 228.]

CONSPIRACY — COMMON DESIGN. — "ALL PERSONS ARE PRINCIPALS WHO ARE GUILTY OF ACTING TOGETHER in the commission of an offense," under the Texas Penal Code, article 74; actual presence is not necessary if at the time of commission the absent party is doing his part in connection with a furtherance of the common design; and all persons are principals who procure aid, arms, or means of any kind to assist in committing the offense, while others are executing the unlawful act, or who endeavor to secure the safety or concealment of the offenders at the time of the commission of the offense: Texas Penal Code, art. 76.

IN CONSPIRACY, EACH PARTY IS CRIMINALLY RESPONSIBLE FOR ACTS OF HIS ASSOCIATES COMMITTED IN FURTHERANCE OF THE COMMON DESIGN when such parties combine together to commit any unlawful act.

INSTRUCTIONS WHICH PRESENT MATTERS OF FACT, SUPPORTED TO SOME EXTENT AT LEAST BY THE EVIDENCE, should be given, and it is error to refuse them; the court may not ignore matters of fact submitted by a defendant, by refusing to submit to the jury the law applicable thereto.

IN INDICTMENT FOR FELONY, ONE CHARGED AS PRINCIPAL CANNOT BE CONVICTED AS AN ACCOMPLICE.

FELONY. — BURDEN OF PROOF NEVER SHIFTS FROM THE STATE TO DEFENDANT, but is upon state throughout.

THE following are the instructions which were refused and are discussed in the opinion: No. 3: "The defendant asks the court to charge the jury that an accomplice is one who is not present at the commission of an offense, but who, before the act is done, advises, commands, or encourages another to commit an offense, or who agrees with the principal offender to aid him in committing the offense, or who prepares arms or aid of any kind prior to the commission of an offense, for the purpose of assisting the principal in the execution of the same. You are further charged, gentlemen of the jury, that the defendant, George Phillips, being charged as a principal offender, he cannot, under the law of this state, be convicted as an accomplice. If you believe from the evidence that the defendant is guilty as an accomplice under the law as before given, you will find him not guilty; or if you believe defendant guilty from the evidence, but have a reasonable doubt whether he is guilty as a principal or as an accomplice, you will find the defendant not guilty. The defendant is presumed by the law to be innocent until his guilt is established by legal evidence, and if from the evidence before you in this case, you have a reasonable doubt as to the defendant's guilt, you will acquit him. The burden of proof never shifts from the state to the defendant, but is upon the state throughout." Special charge No. 4: "You are further charged that the defendant, George Phillips, being charged as a principal offender, he cannot, under the code of this state, be convicted as an accomplice."

Peet and Crosby, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. Though appellant has been convicted upon an indictment charging him alone with the murder of Lewis Rhiden, the testimony shows that several other parties were connected with and implicated in the killing. There is no positive testimony identifying the party who actually fired the fatal shot, and whilst all the state's witnesses testify to the personal presence of this defendant, and place him in position and surround him with circumstances that lead almost irresistibly to the conviction that with his own hand he committed the murder, he, on the other hand, has proven, by the positive

testimony of his principal witness, that he was not only not present, but that he was so distant he could not have heard the fatal shot by which the murder was committed. This witness was a white man,—all the other parties present at the time, witnesses and participants, being negroes. The murder was committed at night, some time after dark.

Inasmuch as the most serious questions arising upon this appeal relate to the correctness and sufficiency of the charge of the court to the jury with reference to conspirators and principal offenders, it may be well to state the substance of the uncontradicted and undisputed facts showing specifically the defendant's relation to the homicide. It appears that appellant's infant child had been taken by some one and spirited away,—when and under what circumstances does not appear, nor does it appear what supposed connection, if any, deceased had with the abduction and concealment of the child. The homicide was committed on Monday night. On the previous Saturday night defendant went to the house of deceased with a gun, after the family had gone to bed, inquired for deceased, and when told he was not there, said he intended to kill him. On Monday defendant was at the house of deceased three times; on the first occasion early in the morning, and when told that deceased was not there, he told the family to tell deceased that he intended to kill him that night. About an hour by sun he again appeared at the house, and being told that deceased had not returned, said: "Tell Lewis Rhiden that he had better get his gun ready, for me and George Nixon, Aaron Nixon, and Bill Evans are coming here to-night and kill him, or hurt him d——d badly." Some time after this the defendant passed deceased's house, and the latter being at home, the defendant asked him to help him hunt his child, when deceased said that he was sick, but if defendant would wait till morning he would go with him to hunt his wife and child. As defendant was leaving he said that George Nixon, Aaron Nixon, and Bill Evans were going with him. That same evening all the last-named parties and the defendant met at the house of Jim Phillips, where they were preparing arms and ammunition, and about dark started off towards the house of deceased, and when George Nixon said, "Boys, this is a mighty particular matter we are going into," defendant said, "Yes, come on; the one that crawfishes out of this business, we will all turn on him." Defendant's witness, the white man, Jim Buie, says that some negroes came to Mit Buie's,

where he and defendant were, and called defendant out and talked with him just before the witness and defendant were about to start off on horseback to hunt for the defendant's child, but that he does not know whether they were George Nixon, Aaron Nixon, and Bill Evans, or not,—the witness was near-sighted, and could not see well at a distance,—but that these same parties, whoever they were, were at the house of deceased when he and defendant passed the house going to Ned Wagoner's, six miles distant, in search of the child. There is but little, if any, conflict in the testimony up to this point.

The state's witnesses say that, just before the killing, George Nixon came to the fence in front of the house and called deceased out, and that these two were sitting on the fence talking when Jim Buie, Bill Evans, and defendant passed by, all armed, and defendant told deceased he wanted to see him, and deceased replied, "I want to see you too"; that after having gone about forty yards, the parties stopped in the road, and defendant called to deceased to come down there; that deceased started, but was shot by some one of the parties in the road; that is, by Jim Buie, Bill Evans, or defendant.

Defendant's witness, Jim Buie, positively denies that he and defendant either said anything to deceased or any one else as they passed; denies that they stopped and witnessed the shooting; denies that they even heard the report of the gun which did the killing; and further testified that he, the witness, did not hear of the killing until the next morning; that defendant was with him all the time; that they went six miles to Wagoner's and returned back to Plummer's, within a mile of the place of the homicide, together. There is other evidence which tends to show that the shooting was done from a fence corner inside the field, and by Aaron Nixon, who, it will be observed, was not seen with the other parties at the house of deceased about the time of the shooting.

From the facts we have detailed, we think it is reasonably apparent that a conspiracy was deliberately entered into between Aaron Nixon, George Nixon, Bill Evans, and this defendant, to take the life of Lewis Rhiden. It is also equally apparent that such conspiracy was formed in the interest and at the instance of this defendant. He, it seems, had determined and repeatedly declared his intention to kill deceased. He is the only one of the parties who had any such motive, or who had ever declared such intention. In entering into

the conspiracy and participating to the extent they or either of them went in its consummation, the other parties appear to have been actuated solely by their friendship for defendant. He seems to have been the very head and front of the conspiracy, and, to say the least of it, was the most active leader and participant up to and within but a short time of its consummation. If there is any evidence of an abandonment upon his part, it consists in the fact, if it be a fact, that he did not stop to consummate or be present at its consummation, but went on with Jim Buie, out of sight and hearing of the deed, and his going on with Buie, instead of being evidence of abandonment, may be equally as strong evidence to convict him as a principal in the murder.

Suppose Buie to have been all that is claimed for him by the defense,—an upright, truthful, honest, Christian citizen, who would be so far from engaging in the conspiracy himself as that he would do all in his power to prevent its accomplishment, and that this fact was known to defendant and his confederates,—what more reasonable and natural than that they should arrange to have him absent at the denouement, so that he should not be able to prevent nor be able to testify against the parties engaged in it? and what more plausible reason could be had to get him away than for defendant to urge him on and accompany him to Wagoner's in pretended search of the child? In furtherance of the conspiracy, it may have become necessary that appellant should have taken Buie away from the scene in order to conceal the crime and its perpetrators, and the fact of his own complicity in it. If so, then he was a principal, though not present at its commission.

“All persons are principals who are guilty of acting together in the commission of an offense”: Penal Code, art. 74; not alone those who are present, but all who are acting together in its commission. Actual presence is not necessary, if at the time of commission the absent party is doing his part in connection with and furtherance of the common design: Willson's *Crim. Stats.*, sec. 142. Again, it is expressly provided by statute that “all persons who shall engage in procuring aid, arms, or means of any kind to assist in the commission of an offense, while others are executing the unlawful act, and all persons who endeavor at the time of the commission of the offense to secure the safety or concealment of the offenders, are principals, and may be convicted and punished as such”: Penal Code, art. 76.

It is also a familiar general rule that when several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance or in prosecution of the common design for which they combine: *Bowers v. State*, 24 Tex. App. 543; *Kirby v. State*, 24 Tex. App. 14; *Williams v. State*, 81 Ala. 1; 60 Am. Rep. 133; 9 Crim. Law Mag. 480; Willson's Crim. Stats., sec. 151.

So much for the state's theory of the case, and it may suffice to say that the charge of the court was substantially correct in presenting the law applicable to this theory.

But on the other hand, there were two theories insisted upon for the defense: 1. Abandonment of the conspiracy by defendant; and 2. That having abandoned the former design to kill Rhiden, all the inculpatory acts proven against appellant prior thereto, if he could be held liable for them at all, in any manner, after such abandonment, or if, without abandonment, he was liable for them, he not being present at nor acting with his co-conspirators in the killing, he would be liable as an accomplice (Penal Code, art. 79), and not as a principal, and if as an accomplice, that then he could not be convicted under the indictment, which charged him alone as a principal offender. Special instructions covering these phases of the defense were requested for the defendant and refused by the court, and bills of exceptions saved to the refusal.

It was error for the court to refuse these instructions, because, whatever might have been the opinion of the court as to the truth or merit of the defenses, they presented matters of fact, supported, to some extent at least, by the evidence. "In all criminal cases the jury are the exclusive judges of the facts proved and of the weight to be given to the testimony," etc.: Code Crim. Proc., art. 728. And it is not for the court to ignore matters of fact submitted by a defendant, by refusing to submit to the jury the law applicable thereto. "Every theory of the case presented by the evidence, whether strongly or weakly supported thereby, demands instructions to the jury directly and pertinently thereto, and this rule applies to every theory within the scope of the indictment which the evidence tends to establish, whether favorable to the state or the defendant": Willson's Crim. Stats., sec. 2338.

When an indictment for felony charges the defendant as a principal offender under the code, he cannot be convicted as an accomplice: *McKeen v. State*, 7 Tex. App. 631. The dis-

inction between these two different characters of offenders has been so often defined that it is only necessary to refer to such later decisions upon the subject as *Smith v. State*, 21 Id. 108; *Watson v. State*, 21 Id. 598; *Collins and Lindly v. State*, 24 Id. 142; and *Blain v. State*, 24 Id. 626.

Another refused instruction was that "the burden of proof never shifts from the state to the defendant, but is upon the state throughout." This proposition is elementary, and has but few and rare exceptions: *Black v. State*, 1 Tex. App. 368.

Several other errors are complained of, but inasmuch as they may not arise at another trial, we refrain from discussing them. Because of errors in the charge of the court pointed out, the judgment is reversed and the cause remanded.

JURY MUST DETERMINE WHETHER ACT DONE by a member of a conspiracy naturally flowed from, and was done in furtherance of, the common design, so as to make him guilty as a participator in the conspiracy: *Bowers v. State*, 24 Tex. App. 542; 5 Am. St. Rep. 901. Law of criminal conspiracy generally: See *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, and note 473-492; *State v. Roberts*, 15 Or. 187; *State v. McCahill*, 72 Iowa, 111.

IN CRIMINAL CASES, BURDEN OF PROOF NEVER SHIFTS, but rests upon the prosecution throughout: *Tiffany v. Commonwealth*, 121 Pa. St. 165; 6 Am. St. Rep. 775, and note 780.

SELF-DEFENSE, BURDEN OF PROOF: *Brown v. State*, 83 Ala. 33; 3 Am. St. Rep. 685, and note 688.

TERM "ACCOMPLICE" INCLUDES ALL PERSONS CONCERNED in the commission of an offense, irrespective of the grade of their guilt: *People v. Kraker*, 72 Cal. 459; 1 Am. St. Rep. 65.

TO CONVICT ONE AS AIDER AND ABETTOR, the principal must be indicted with him, or, if he be indicted alone, the indictment must disclose the name of the principal, and give a description of his acts: *Mulligan v. Commonwealth*, 84 Ky. 229.

MEULY v. STATE.

[26 TEXAS APPEALS, 274.]

UPON MOTION FOR CHANGE OF VENUE ON GROUND OF PREJUDICE, EVIDENCE is admissible other than that of the supporting affiants, and witnesses may be examined on both sides as to the existence or non-existence of "prejudice" in the county. Article 583 of the Code of Criminal Procedure of Texas does not, in such cases, restrict the matters to be investigated solely to the credibility and means of knowledge of the defendant's compurgators in the application.

ON TRIAL FOR MURDER, INSTRUCTIONS SHOULD DISTINCTLY SET FORTH THE LAW applicable to the case, not alone the case as made by the evidence for the prosecution, but the case as made by all the evidence, and especially the law applicable to any favorable evidence comprising defensive matter in behalf of the accused.

SELF-DEFENSE. — Under the law of Texas, a party has a right to defend himself against any assault, or threatened assault, made upon his person, calculated to inflict death or serious bodily injury; and it is not essential to his perfect right of self-defense that the danger be real or in fact exist; it may only be apparent. If it reasonably appears from the circumstances of the case that danger existed, the person threatened with such apparent danger has the same right to defend against it, and to the same extent, that he would have were the danger real. But if a party, by his own wrongful act, brings about the necessity of taking the life of another to prevent being himself killed, he cannot say that such killing was in his necessary self-defense, but it will be imputed to malice, express or implied, by reason of the wrongful act which brought it about, or malice from which it was done.

MURDER. — THE RULE AS TO SELF-DEFENSE IS LIMITED BY THE INTENTION of a party who brings about the necessity of taking the life of another. If the intention was not felonious, the homicide which necessity compelled will not be murder.

INSTRUCTION — SELF-DEFENSE. — If a party's right to self-defense depends upon the intent with which he provoked the difficulty, and the intent is a fact to be found by the jury, then the charge of the court, in cases where the evidence creates any doubt as to the character of the intent, should always instruct the jury as to the distinction between perfect and imperfect self-defense, as applicable to the particular act of accused, and his liability.

SELF-DEFENSE. — WHERE THERE ARE MORE ASSAILANTS THAN ONE, the slayer has the right to act upon the hostile demonstrations of either one of them, and to kill either of them if it reasonably appear to him that they were present, acting together to take his life or do him serious bodily injury.

RIGHT OF SELF-DEFENSE exists, notwithstanding a mere preparation to commit the wrongful act, where there is no accompanying demonstration which indicates the wrongful purpose.

MANSLAUGHTER. — A PERSON ILLEGALLY RESTRAINED OF HIS LIBERTY may not only oppose force to force, but can increase that force to killing of his adversary, if necessary to prevent the attempted wrong, and such killing is reduced to manslaughter.

MANSLAUGHTER. — WHERE ONE, UNDER THE INFLUENCE OF SUDDEN PASSION, KILLS ANOTHER, not having provoked the contest with intent to kill, but, under the influence of terror produced by the acts of his adversary, procures a pistol as a means of defense in case of an attack, or in case of an attempted enforcement of a threat to illegally restrain him of his liberty, and the acts, words, and conduct of his adversary are such as to arouse anger, rage, sudden resentment, or terror, rendering his mind incapable of cool reflection, and under the immediate influence of the sudden passion the killing is done, this is not murder, but manslaughter: Texas Penal Code, arts. 593, 594.

QUESTION WHETHER ACT OF KILLING WAS CAUSED BY PASSION IS FOR THE JURY, and not for the court, to pass upon, where the evidence tends to show that passion was aroused by an adequate cause.

THE following charges made by the court were claimed to be erroneous: "Therefore, if the jury believe from the evidence that, at the time of the homicide, that the deceased made any

hostile demonstrations towards defendant, or any gestures as if to draw a weapon, under circumstances reasonably calculated to produce in the mind of the defendant a reasonable expectation or fear of death or great bodily injury, and that defendant actually believed that the deceased was about to murder or maim him, and that while said deceased was in the act of making such hostile demonstration, or such threatening gesture, defendant Meuly shot and killed deceased, then and in that event said Meuly would be justified in taking the life of said Douglas, and if you so find, you will acquit him. *a.* The jury are further instructed that a party who seeks a difficulty with a deadly weapon, and who makes the first hostile demonstration or aggression, cannot justify under the law of self-defense. And likewise, a party who seeks and provokes a difficulty, with the intention of taking advantage of any hostile demonstration on the part of his adversary, would not be excused or justified in the eyes of the law for the homicide committed under such circumstances. *b.* And hence, if the jury find that the defendant approached the deceased in a hostile manner, with a pistol in his hand, intending to take advantage of any hostile move on the part of deceased, knowing that such an act on his part might probably result in death, either to himself or the deceased, then in that event defendant would not be justified or excused in taking the life of deceased, however great the necessity therefor. *c.* Again, if the jury shall believe from the evidence that defendant made the first hostile demonstration toward the deceased, and by his own wrongful acts brought about and produced the necessity of taking deceased's life, to avoid and prevent being himself killed, then, and in such a case, he cannot say the killing was in his own necessary self-defense. Therefore, a homicide committed under such circumstances as are enumerated in either of the last three preceding portions of this charge, marked *a*, *b*, and *c*, would constitute murder in one of the degrees, and a killing under such circumstances will be imputed to malice, express or implied, by reason of the wrongful act which brought it about, or the malice from which it was done. And hence, if the jury shall believe from the evidence that defendant shot and killed deceased under such circumstances as are enumerated in either of said portions *a*, *b*, and *c*, they will then find him guilty of murder, and the degree of such murder as the facts shall warrant, and assess the proper penalty." The following charge was requested by the

defense, but was refused: "The jury are instructed that if you believe from the evidence that it reasonably appeared to the defendant, Alexander Meuly, from the circumstances arising from the acts or words of H. A. Burbank and the deceased, H. Douglas, that the said defendant was in danger of serious bodily injury, or that his life was in danger, and that said defendant acted under such belief, then defendant was justifiable in defending himself against the circumstances constituting, in his mind, the apparent danger, to the same extent as if the danger had been real. If, therefore, you believe the defendant, in so defending himself against the apparent danger, acted under the reasonable belief that he was in danger of serious bodily injury, or that his life was in danger at the time he shot and killed said Douglas, under the law he was justified, and you will acquit him."

J. O. Nicholson, Stanley Welch, and G. R. Scott, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. This voluminous record contains fourteen bills of exception reserved by defendant to rulings of the court at the trial, and twenty-four assignments of error submitted on this appeal as grounds for reversal of the judgment. Our conclusion as to the course necessary to be taken in the disposition of the case on this appeal renders it unnecessary to discuss but one or more of these supposed errors, as they are of a character not likely to arise on another trial in the court below. Some of them become important in view of another trial, and to such alone we propose to confine our discussion.

1. Appellant moved for a change of venue in the case, and based his motion upon the first ground named in the statute: Code Crim. Proc., art. 578; that is, that there existed against him so great a prejudice in the county that he could not obtain a fair and impartial trial. His application was controverted by the district attorney under the provisions of article 583 of the Code of Criminal Procedure, and many witnesses were permitted to be examined on both sides as to the existence or non-existence of "prejudice" in the county. It is urgently insisted that such testimony was inadmissible, and contravenes the obvious purpose and intent of article 583, which, it is contended, limits and restricts the matters to be investigated solely to the credibility and means of knowledge of the defendant's compurgators in the application. In other words,

that if the credibility and means of knowledge of the compurgators are alone authorized to be attacked, this cannot be done by proof generally of the non-existence of prejudice, and that in such a contest it is error to go into a general investigation as to the existence and non-existence of prejudice.

Now, what was the sole issue presented by defendant's application, and the supporting affidavits of the compurgators? It was the existence or non-existence of prejudice. Their means of knowledge upon this matter was attacked. To show that such prejudice did not exist manifestly tends most strongly to prove that they did not possess correct means of ascertaining the truth of the matter. Under this issue as to "the means of knowledge" of the compurgators, it has been more than once decided that the "defendant would have the right to prove the existence of the prejudice by any witness besides the affidavit of his compurgators; and on the other hand, the state would have the right to prove that no such prejudice did in fact exist. The supporting affiants could be thoroughly tested as to their means of knowledge by either party": *Davis v. State*, 19 Tex. App. 201; *Pierson v. State*, 21 Id. 14; *Smith v. State*, 21 Id. 277; *Scott v. State*, 23 Id. 521; *Henning v. State*, 24 Id. 315.

2. In our opinion, the most serious questions presented for our adjudication are those calling in question the sufficiency of and the correctness of the charge of the court.

A general, and as we believe a most humane and just, rule in the trial of one charged with murder is, that the jury should, as far as possible, judge of the facts surrounding the homicide from the standpoint of the defendant. In order to do this properly, they must have submitted to them in the charge of the court all the law legitimately and fairly arising upon the evidence which he has adduced in his defense. If the evidence be legal, competent, and admissible, then, when the court has admitted it, whether the court may believe it true or false makes no difference, it becomes part of the case, and the jury alone have the right to say, under appropriate instructions pertinent to it, what degree of credibility shall be accorded the witnesses who have testified, and what weight shall be given to the testimony; and they also have the right to pass upon all issues legitimately arising upon such testimony. The statute enjoins it that the charge shall distinctly set forth the law applicable to the case,—not alone the case as made by the evidence for the prosecution: the case as made by

all the evidence; and especially is it the duty of the court to submit in its charge the law applicable to any favorable evidence comprising defensive matter in behalf of the accused: *Burkhard v. State*, 18 Tex. App. 599. "A defendant in a criminal case has a right to have instructions given, based on the testimony of his witnesses, although contradicted by the testimony of the prosecution": *Partlow v. State*, 4 S. W. Rep. 14. Without discussing *seriatim* the several errors complained of as to the charge of the court in this case, and so ably argued in the briefs of counsel for appellant, we propose to set out substantially the testimony of the principal witnesses for defendant, and from that testimony deduce such applicable rules of law as, in our opinion, have been misconceived and overlooked in his instructions by the learned trial judge, and to which the defendant was entitled.

One L. E. Riverton, *alias* Reinhard, was the main witness for the defendant, and he testified to his previous acquaintance with defendant, and the circumstances which brought about a game of "pin-pool" between one Burbank and defendant, at the Commercial saloon in Laredo, where the homicide occurred, between four and five o'clock on Monday morning, March 29, 1886. This game commenced about nine o'clock Sunday evening, and Riverton was asked by both parties to count the game, which he did. He says: "About one, A. M., a stranger came in and sat down at the pin-board; this was Douglas, who was drunk. He made some remarks about the game from time to time, and I was annoyed thereby, but Burbank said, 'Pay no attention to him.' At about two o'clock, A. M., I noticed that Mr. Burbank was not playing fair. I suggested to Meuly that we go to bed, and refused to count the game longer, and went and sat down. At about four o'clock, A. M., Meuly was indebted to Burbank sixty dollars, and said to Burbank, 'I will play you one more game, for sixty dollars.' Burbank said, 'No; I will play you for fifty dollars. I ought to have ten dollars for staying up all night.' Meuly agreed to play for fifty dollars, and said he would give Burbank a check on Corpus. I was asked to keep the tally for them for these last games, which was to be the best two out of three. Burbank won the first horse, Meuly won the second horse. At the commencement of the third game Meuly said, 'Burbank, give the balls a square shake.' The game proceeded, and when Burbank had made thirteen he shot at the three pin, knocked it down, and also the one pin, and exclaimed, 'Busted!' He shot again

and made some pins, and Meuly exclaimed, 'I will make pool soon.' Burbank had fifteen counted on his string, and after some conversation, knocked down the four and three pins, and said, 'Pool.' Meuly said that was a mistake. I counted up seven and the fifteen, making twenty-two, and Burbank pulled out the nine ball from his pocket and threw it on the table. Meuly said that must be a mistake. He took up his and Burbank's ball and the bottle, and let the balls run out on the west side of the table, counting out fourteen balls, and said, 'This is evident that something is wrong.' At this time I was seated at the east side of the billiard-table, and I noticed Burbank take another ball out of his pocket, and concealing it in his hand, said, 'Are there only fourteen balls there?' and extended his hand and raked in the fourteen balls, counted all the balls together, and said, 'There are fifteen balls there.' 'Yes,' said Meuly, 'there are fifteen now. I have enough of this game.' Douglas spoke up and said, 'Burbank, get your money.' Burbank replied, 'Yes, I want the money before you leave the house.' Meuly said, 'You will get your money'; and he picked up his coat and walked out behind the bar and washed his hands. Burbank, Douglas, and myself followed Meuly, and Burbank asked Meuly if he would take something to drink. Meuly replied that he did not care for anything. They were in front of the bar. I was in rear of all, about the center of the room. Meuly had his side to the bar. Douglas said to Burbank, 'Get your money before he leaves the house'; and Burbank said, 'Yes, he wanted it before he left the house.' At the same time Burbank said something to the bar-keeper in Spanish, and the bar-keeper handed him a revolver. At the time Burbank received the pistol, Meuly looked around and saw it. Meuly then said to me, 'Will you please step up to my room and bring me my valise; I want to pay him the money I owe him.' I replied, 'Certainly,' and started after it." Here the witness tells of his getting the valise and returning with it to the saloon. He then proceeds: "I took the valise into the threshold of the door of the Commercial saloon. Meuly stepped from within into the doorway, took out a key and opened the valise. He first took out a paper which looked like a check, and with his right hand he took out a revolver, and left the valise open in front of me. Douglas was standing at the counter nearest the door, and Burbank beyond him. Meuly, with the pistol hanging down by his side, in his right hand, went past Douglas and up to

Burbank, and said, 'Burbank, you demanded this money twice before I left the house; how do you want it?' Douglas was leaning with his right arm on the counter. I think he must have seen the pistol. He said, 'You will see d——d quick,' and ran his right hand into or on his hip pocket. Meuly wheeled on him, and threw his revolver down on him, and touched him on the lappel of his coat with his left hand and said, 'My friend, this is something that does not concern you, and I wish you would throw up your hands.' Douglas did not pay any attention, nor did he say anything, but kept pulling at something he had in his pocket. Meuly waited a moment, and said, 'Throw up your hands, or I will have to cut you down.' Douglas made another jerk, and Meuly fired and shot him. Meuly wheeled on Burbank, and said, 'Burbank, you have a gun on you; I want it'; and threw his pistol down on him. Burbank said he was a deputy, and had a right to carry it. Meuly said, 'I don't give a God d——n what you are; give up your gun.' With this, Burbank made a movement to get ready to [shoot] him, and Meuly said, 'Stand up there, or I will shoot the head off of you.' Burbank then threw his hands up, and Meuly reached over and took Burbank's pistol and said, 'You get!' and Burbank turned about half-way toward me and got."

This is the testimony of the defendant's main witness. It was in evidence that Douglas's dead body was examined in a short time after the killing, and a pistol was found in his right-hand hip pocket. Burbank, the principal state's witness, says that during Riverton's absence (after Meuly's valise), "Meuly walked up and down the room in front of the door. In a few moments I saw something handed into the door to Meuly."

3. Under our law, a party has the right to defend himself against any assault or threatened assault made upon his person, calculated to inflict death or serious bodily injury: *Hunnicut v. State*, 20 Tex. App. 634. And it is not essential to his perfect right of self-defense that the danger be real or in fact exist. It may be only apparent, and not real. If it reasonably appear from the circumstances of the case that danger existed, the person threatened with such apparent danger has the same right to defend against it, and to the same extent, that he would have were the danger real: *Willson's Crim. Stats.*, sec. 978; *Tillery v. State*, 24 Tex. App. 251. This perfect right of self-defense, however, may be destroyed entirely

or abridged by the acts of the party. For if a party by his own wrongful act brings about the necessity of taking the life of another to prevent being himself killed, he cannot say that such killing was in his necessary self-defense, but the killing will be imputed to malice, express or implied, by reason of the wrongful act which brought it about, or malice from which it was done. A person cannot avail himself of a necessity which he has knowingly and willfully brought upon himself: Willson's Crim. Stats., sec. 981; *Allen v. State*, 24 Tex. App. 216.

But whilst this is the rule as to a perfect right of self-defense, such rule is limited by the intention of the party producing this necessity to take life. If his intention was not felonious, then the homicide which his necessity compelled will not be murder. For, as is well said by the supreme court of Missouri in Partlow's case: "Indeed, the assertion of the doctrine that one who begins a quarrel or brings on a difficulty, with the felonious purpose to kill the person assaulted, and accomplishing such purpose, is guilty of murder, and cannot avail himself of the doctrine of self-defense, carries with in its very bosom the inevitable corollary that if the quarrel he begun without a felonious purpose, the homicidal act will not be murder. To deny this obvious deduction is equivalent to the anomalous assertion that there can be a felony without a felonious intent; that the act done characterizes the intent, and not the intent the act": *State v. Partlow*, 4 S. W. Rep. 14; *Reed v. State*, 11 Tex. App. 510; 40 Am. Rep. 795; *Peter v. State*, 23 Tex. App. 684.

Now, if the party's right of self-defense, as to its extent,—that is, whether perfect or imperfect,—depends upon the intent with which he provoked the difficulty, and the intent is a fact to be found by the jury, then it seems clear that the charge of the court, in cases where the evidence creates any doubt as to the character of the intent, should always instruct the jury as to the distinction between the right of perfect and imperfect self-defense as applicable to the particular act committed by the accused, and the extent of his liability when measured by it.

If, in the case in hand, Meuly did not provoke a difficulty with the purpose and intent to kill either Burbank or Douglas, but went to them, after getting his check and pistol from the valise, with the purpose and intent of settling the debt he owed Burbank, and an altercation ensued, in which they or either of them, by words accompanied by acts, ~~or~~ by acts

alone, created a reasonable apprehension in his mind of death or serious bodily injury, and, acting under such reasonable apprehension and appearances of danger, he shot and killed Douglas, he believing the parties were acting together, or Douglas being the party making the demonstrations creating his apprehensions, then he would be justified on the ground of necessary self-defense: *Bonnard v. State*, 25 Tex. App. 174; *ante*, p. 431. When there are more assailants than one, the slayer has the right to act upon the hostile demonstrations of either one of them, and to kill either of them if it reasonably appeared to him that they were present acting together to take his life or do him serious bodily injury: *McLaughlin v. State*, 10 Tex. App. 340; *Cartwright v. State*, 16 Id. 473; 49 Am. Rep. 826; *Jones v. State*, 20 Tex. App. 665; *Bean v. State*, 25 Id. 347.

Of course, in determining Meuly's intent, the jury will take into consideration the fact of Meuly's arming himself with a pistol, and also the language which he used as tending to provoke the difficulty. Was the language calculate to provoke a difficulty? Upon approaching them, if his act was to throw his pistol down upon them, accompanied by the demand, "Throw up your hands," there can be no question as to the provocation, and his intention to produce a deadly conflict. If, however, having the check in one hand and the pistol hanging by his side in the other, his remark was, "You have twice demanded that I pay you your money before leaving the house; now, how will you take it?"—was that such language and conduct as would likely bring on a fatal rencontre? If not, then he is not liable as having provoked it. The rule is, that "the right of self-defense is not impaired by mere preparation for the perpetration of a wrongful act, unheralded and unaccompanied by any demonstration, verbal or otherwise, indicative of the wrongful purpose": *Cartwright v. State*, 14 Tex. App. 486; 49 Am. Rep. 826; *Cunningham v. State*, 17 Id. 89; *White v. State*, 23 Id. 155.

4. As to manslaughter: If from the words of Burbank and Douglas, accompanied by Burbank's conduct in getting and putting his pistol conveniently for use on his person, Meuly really believed that they did not intend that he should leave the house until he paid the money, and he was thus placed in restraint of his liberty, and knowing that he could not pay the money, and believing they would decline the check and still refuse to let him go, he shot in order to effect his release from

the illegal restraint thus imposed, the offense would be manslaughter, and not murder. "An illegal attempt to restrain a man's liberty, even under color of legal process, is such provocation as to reduce the offense to manslaughter. This holds where a man is injuriously restrained of his liberty, as where a creditor stood at the door of his debtor with a drawn sword to prevent him from escaping while he sent for a bailiff to arrest him": Wharton on Homicide, sec. 447. A citizen authorized to stand upon his individual rights may oppose force to force in the prevention of an attempted wrong, and when illegally restrained of his liberty, may not only oppose force to force, but can increase that force even to the killing of his adversary, if necessary to prevent the attempted wrong: *Ross v. State*, 10 Tex. App. 455; 38 Am. Rep. 643; Willson's Crim. Stats., sec. 976.

Again, if Meuly, not intending to provoke a contest with intent to kill (Code Crim. Proc., art. 603), but under the influence of terror, produced by the acts and conduct of Burbank and Douglas, procured his pistol as a means of defense in case they should attack or restrain him upon his failure to pay the money before he could leave the house, and their acts, words, and conduct when he asked how they would have the money were such as to arouse either of the emotions known as anger, rage, sudden resentment, or terror, rendering his mind incapable of cool reflection, and under the immediate influence of the sudden passion thus aroused, he shot and killed Douglas, then his offense would be manslaughter, and not murder: Penal Code, arts. 593, 594. Where the evidence tends to show that passion was aroused by an adequate cause, the question whether the act of killing was caused by the passion is for the jury, and not the court, to pass upon: *Mackey v. State*, 13 Tex. App. 360; Willson's Crim. Stats., sec. 1009. In this case the court refused, though requested, to charge upon manslaughter.

Because the charge of the court did not sufficiently present the law applicable to the theories legitimately arising upon the evidence adduced in behalf of the defendant, the judgment is reversed, and the cause remanded for another trial.

MOTION FOR CHANGE OF VENUE, on the ground that there exists in the community such a prejudice that the accused cannot obtain an impartial trial, is properly overruled, until it can be shown by an examination of a sufficient number of jurors that a fair and impartial jury cannot be obtained: *State v. Gray*, 91 Nev. 212.

MURDER, INSTRUCTIONS TO JURY: *State v. Landgraf*, 95 Mo. 97; 6 Am. St. Rep. 26, and note 31; *Lynch v. State*, 24 Tex. App. 350; 5 Am. St. Rep. 888, and note 893; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320.

SELF-DEFENSE IN CASE OF HOMICIDE, GENERALLY: *Lynch v. State*, 24 Tex. App. 350; 5 Am. St. Rep. 888, and note 893; *Jones v. State*, ante, p. 454; *Bonnard v. State*, ante, p. 431.

MANSLAUGHTER: *Bonnard v. State*, ante, p. 431, and note 435.

HIGH v. STATE.

[26 TEXAS APPEALS, 545.]

TWO OF THE "ADEQUATE" CAUSES SUFFICIENT TO REDUCE A HOMICIDE FROM MURDER TO MANSLAUGHTER are: "1. An assault and battery by the deceased causing pain and bloodshed; and 2. A serious personal conflict, in which great injury is inflicted by the person killed, by means of weapons or other instruments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide were the aggressor, provided such aggression was not made with intent to bring on a conflict for the purpose of killing": Texas Penal Code, arts. 593, 597. And it is expressly declared that "an assault and battery so slight as to show no intention to inflict pain or injury" is not adequate cause: *Id.*, sec. 596.

HOMICIDE IS PERMITTED BY LAW IN NECESSARY SELF-DEFENSE for the purpose of preventing murder, or maiming, or serious bodily injury, and the only qualification prescribed is "that the attack upon the person of an individual in order to justify homicide must be such as produces a reasonable expectation or fear of death or some serious bodily injury": Texas Penal Code, art. 574. A defendant so attacked is neither bound to retreat nor to resort to any other means before slaying his assailant.

SELF-DEFENSE WHERE THE ATTACK AND INJURY ARE BY THE FISTS OF THE DECEASED, WITH INTENTION OF INFLECTING A BEATING upon defendant, and if defendant had already received serious bodily injury at the hands of deceased, and it reasonably appeared to him from the acts and conduct of deceased that the combat was not over, and that he was about to receive additional bodily injury from deceased, that deceased had the ability to inflict the injury, that the danger was threatening and imminent, and under such circumstances and so believing he shot and killed deceased, then he would be justifiable upon the ground of his necessary self-defense.

MAIMING — WHEN QUESTION IS FOR COURT OR FOR JURY. — To deprive one of a front tooth is to maim him at the common law, and is within the import of the word "member" as used in the Texas Penal Code, and in common acceptance, and the court may assume, without submitting the question to the jury, that a front tooth is a "member" of the body, but the question whether a "corner tooth" is a "front tooth" may become a question of fact to be found by the jury.

MAIMING. — THE INTENTION TO COMMIT AN OFFENSE IS PRESUMED WHENEVER THE MEANS USED IS SUCH as would ordinarily result in the commission of the forbidden act: Texas Penal Code, art. 50; and this applies to a case of maiming, to the exclusion of a claim that deceased did

not intend to "maim" defendant, and that therefore the act was not "willfully and maliciously" done, which latter is an essential element of the offense of maiming under the Texas Penal Code, article 507.

QUESTION FOR THE JURY—INSTRUCTIONS.—IN ORDER TO MAKE KILLING JUSTIFIABLE IN CASES OF MAIMING, THERE MUST BE A "MISTREATING WITH VIOLENCE" at the time of the homicide, though the offense itself may have been completed before the killing: Texas Penal Code, art. 570, subd. 6. And where the blow struck by the deceased, defendant's injury, his fall, subsequent recovery, and firing of a pistol, all appear to have been instantaneous acts, it is for the jury to determine whether there was any cessation of active hostilities and violence, and it is error to refuse instructions relating thereto.

IT IS QUESTIONABLE WHETHER THE CORPUS DELICTI IS SUFFICIENTLY ESTABLISHED where the whole testimony of the cause of death is that given by a companion of the deceased, who testifies: "I knew Louis McDougald; he is dead; Mr. High shot him; I suppose that was the cause of his death,"—no excuse being shown why other evidence on the point was not produced.

John M. Duncan and N. W. Finlay, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. "Manslaughter is voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified or excused by law": Penal Code, art. 593. Two of the adequate causes enumerated in our statute as being sufficient to reduce a homicide from murder to manslaughter are: "1. An assault and battery by the deceased, causing pain or bloodshed; and 2. A serious personal conflict, in which great injury is inflicted by the person killed, by means of weapons or other instruments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide were the aggressor, provided such aggression was not made with intent to bring on a conflict, and for the purpose of killing": Id., art. 597. And it is expressly declared that "an assault and battery so slight as to show no intention to inflict pain or injury" is not an adequate cause: Id., art. 596.

But a homicide is permitted by law in necessary self-defense, when inflicted for the purpose of preventing (among other offenses) murder or maiming, or serious bodily injury; and the only qualification prescribed is, "that the attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death, or some serious bodily injury": Penal Code, art. 574. A defendant so attacked is neither bound to retreat nor to

resort to any other means before slaying his assailant: *Hunnicut v. State*, 20 Tex. App. 634; *Williams v. State*, 22 Id. 497; *Lee v. State*, 21 Id. 241; *State v. Burke*, 30 Iowa, 331.

But where a necessarily deadly weapon be not used by the assailant in making the attack, it oftentimes becomes a nice, if not difficult, matter to properly determine the rights of the defendant as between manslaughter upon the one hand, and self-defense upon the other; as, for instance, in this case, where the attack and injury were by the fists of the deceased, with intention of inflicting a beating upon defendant. If the assault and battery in such a case is so slight as to show no intention to inflict pain or injury, then to kill the assailant would be murder; if pain, bloodshed, or great bodily injury be inflicted, then to kill the assailant will be either manslaughter or justifiable self-defense. Mr. Wharton says: "If such intended beating is of a character to imperil life, or to maim, then the intent is felonious, and the assailed is excused in taking life when necessary to repel the assault. On the other hand, the killing of the assailant under such circumstances, the design of the assailant being to beat, is not murder, and at the highest is manslaughter": Wharton on Homicide, 2d ed., sec. 480. It will be noticed that he limits self-defense which would excuse "to imperil life, or to maim," and not to an attack which might produce serious bodily injury, with or without imperiling life.

We are of opinion the correct doctrine is more fully and lucidly expressed by the supreme court of Pennsylvania in the case of *Commonwealth v. Drum*, 53 Pa. St. 1, than in any authority to which we have access; and it occurs to us that the following excerpts are peculiarly in harmony with our statutes upon the subject. Justice Agnew says: "The act of the slayer must be such as is necessary to protect the person from death or great bodily harm, and must not be entirely disproportioned to the assault made upon him. If the slayer use a deadly weapon, and under such circumstances as the slayer must be aware that death will be likely to ensue, the necessity must be great, and must arise from imminent peril of life or great bodily injury. If there be nothing in the circumstances indicating to the slayer at the time of his act that his assailant is about to take his life or do him great bodily harm, but his object appears to be only to commit an ordinary assault and battery, it will not excuse a man of equal or nearly equal strength in taking his assailant's life with a deadly weapon.

In such a case, it requires a great disparity of size and strength on the part of the slayer, and a very violent assault on the part of his assailant, to excuse it. The disparity on the one hand and the violence on the other must be such as to convince the jury that great bodily harm, if not death, might have been suffered unless the slayer had thus defended himself, or that the slayer had reasonable ground to think it would be. . . . The true criterion of self-defense in such a case is, whether there existed such a necessity for killing the adversary as required the slayer to do it in defense of his life, or in the preservation of his person from great bodily harm. If a man approaches another with an evident intention of fighting him with his fists only, and where, under the circumstances, nothing would be likely to eventuate from the attack but an ordinary beating, the law cannot recognize the necessity of taking life with a deadly weapon. In such a case (pain or bloodshed supervening), it would be manslaughter. . . . But a blow or blows are just cause of provocation; and if the circumstances indicated to the slayer a plain necessity of protecting himself from great bodily injury, he is excusable if he slays his assailant in an honest purpose of saving himself from this great harm." See *Kingen v. State*, 45 Ind. 519; also reported in *Horrigan and Thompson on Self-Defense*, 183. And in such a case, as in all cases of resistance to violence to the person, the assailed party is not bound to retreat, and the reasonable expectations and appearances of serious bodily injury must be judged of from his standpoint.

Article 570 of our Penal Code, which defines the circumstances under which homicide is permitted by law in the prevention of other felonies, "comprises all cases in which, from the acts of the assailant, or his words coupled therewith, it reasonably appears that his purpose or intent is to murder, ravish, rob, maim, disfigure, castrate, or do other serious bodily injury to the assailed party. In such case, the assailed party may lawfully kill the assailant while he is committing the offense or injury, or when he has done some act evidently showing his intent to commit it; and the assailed party need not resort to other means of prevention": *Willson's Crim. Stats.*, sec. 970. One important condition annexed to the right of self-defense by that article (570) is, that the killing must take place before the offense committed by the party killed is actually completed: Subd. 3.

Now, to apply the foregoing principles of law to the facts as

they are exhibited in the record before us, we only recount in substance the salient features of the evidence.

Defendant, an officer at the depot, and empowered with authority to do so, ordered deceased to get off the platform. He also put his hand against the deceased to push or shove him back. Deceased cursed him, — told him not to shove him, or he would “knock a lung out of him.” Defendant cursed back; told deceased if he got upon the platform he would push him off. Deceased shook his fist in defendant’s face, and as defendant pushed or knocked it away, deceased struck him a severe blow in the mouth, which knocked out “a corner tooth,” and sent him staggering several feet against the side of a car, which prevented his falling entirely upon the ground. As soon as defendant could recover himself and straighten up, he drew his pistol, and immediately fired the fatal shot at deceased, who was within a few feet, standing with his fist doubled, and his arm drawn back as though intending to strike again. These, in brief, are all the facts necessary to illustrate what, in our opinion, was an important and material failure or omission in the charge of the court upon the law of self-defense.

According to defendant’s theory, he was struck, bruised, maimed, and to all intents and purposes stricken down. Actual and serious bodily injury has been inflicted upon him. Defendant has, in fact, suffered mayhem of his body, whether the deceased intended such consequences or not; for to knock out a front tooth is to maim him: 2 Bouvier’s Law Dict., tit. Mayhem; 2 Bishop’s Crim. Law, 7th ed., sec. 1001. Smarting under the injury, he recovered himself, sees his antagonist to all appearances prepared, ready, and in the act of repeating the injury. He draws and fires. From the beginning to the end the whole transaction occurs in a very few seconds. It may be said to be almost instantaneous. When defendant recovers himself from the effects of the blow, the combat is not over, for deceased to all appearances has squared himself to deliver another such blow. Can it be said he has completed his offense? It may not reasonably appear so to defendant. From his standpoint it may be reasonable that deceased has not completed his offense, but is in the very act and has the ability of inflicting the same or greater injury, and, *dum fervet opus*, the shot is fired. This is defendant’s theory of the case. We are not expressing our opinion as to the evidence.

Now, if defendant had already received serious bodily injury at the hands of deceased, and it reasonably appeared to him from the acts and conduct of deceased that the combat was not over, that he was about to receive additional bodily injury from deceased, that deceased had the ability to inflict the injury, that the danger was threatening and imminent, and under such circumstances and so believing, he shot and killed deceased, then under the law as above announced, and under our statute, he would be justifiable upon the ground of his necessary self-defense, and if the jury should so believe from the evidence, it would be their duty to acquit him. In the otherwise able exposition of self-defense announced by the learned judge, this phase of the law, which in our opinion was manifestly called for by the facts, if as above stated, was not submitted in plain and affirmative terms.

Again, defendant's counsel asked the court to instruct the jury as follows: "The jury are charged that a person has the right to take the life of another in order to prevent himself from being maimed or disfigured, and the killing may take place at any time while the offender is mistreating him with violence, though the maiming or disfiguring may have been already completed"; and error is assigned upon the refusal thereof, as also upon the refusal of the court to submit any instructions upon the law of maiming in connection with defendant's right of self-defense. The instruction, though sufficient to call the court's attention to the matter of maiming, was not legally correct with reference to the facts as to the term 'disfigured,' there being no evidence of disfiguring as defined in our statute: Penal Code, art. 509.

"To maim is to willfully and maliciously cut off or otherwise deprive a person of the hand, arm, finger, toe, foot, leg, nose, or ear; to put out an eye, or in any way to deprive a person of any other member of his body": Penal Code, art. 507; Willson's Crim Stats., sec. 877.

"To constitute the offense of maiming, the act must be done both willfully and maliciously. A willful act is one committed with an evil intent, with legal malice, and without legal justification. A malicious act is one committed in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief; a wrongful act, intentionally done without legal justification or excuse": *Bowers v. State*, 24 Tex. App. 542.

We have seen that to deprive one of a front tooth is to maim him as understood at common law. The "front tooth" is not, however, used in terms in our code as a "member of the body," but we think it clear that it comes within the import of the word "member" as used in the code, and in common acceptation, and under the authorities cited above, we believe that as to "the front tooth" the court may well assume that it is "a member" of the body, with submitting the question as a matter of fact to the jury. *Slattery v. State*, 41 Tex. 619, appears to hold otherwise. It would be, however, in this case a question of fact, to be found by the jury, whether a "corner tooth" was a "front tooth."

It may be said that deceased did not perhaps intend to "maim" defendant, and that therefore the act was not "willfully and maliciously" done. But it is statutory that "the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act": Penal Code, art. 50; and it is elementary that "a man is always presumed to intend that which is the necessary or even probable consequence of his acts, unless the contrary appears": Willson's Crim. Stats., sec. 109.

In cases of maiming, it is provided that the killing will be justifiable if done in its prevention, and "the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense": Penal Code, art. 570, subd. 6. Was the deceased mistreating the defendant with violence when the latter fired the fatal shot? This was a matter of fact to be found by the jury under appropriate instructions from the court. We have already stated the facts in another connection. The tooth had already been knocked out, if at all, when defendant fired. The maiming was therefore complete. If deceased had his fist doubled and arm drawn back to again strike, was attempting to strike, and had an immediate intention coupled with the ability to strike, he was committing an assault: Penal Code, art. 484; the test being, Was there in fact a present purpose of doing an injury? Willson's Crim. Stats., sec. 811. To commit an assault upon a party is certainly to "mistreat" him. But an assault merely is not "violence," and, as we have said, there must be "mistreating with violence." Under the facts of this case the question was, Had there been any cessation of violence by the deceased? The blow, the injury,

the fall, the recovery, the doubling of the fist and drawing back to strike, the drawing and the firing of the pistol, all appear to have been instantaneous acts of the transaction, with scarcely a pause even or let up in the continuity of the acts. In such a state of case, it was for the jury to determine from the facts whether there was any cessation of active hostilities and violence. We are of the opinion the court also erred in declining to submit the law of maiming in connection with defendant's right of self-defense.

It is questionable if the *corpus delicti* is sufficiently established. It is certainly not as definitely proven as it might have been by the testimony of the physician who examined the wound, and ministered to the dying man. The deceased was shot between eight and nine o'clock Sunday night, and died about six o'clock the following Monday evening; he was attended by physicians, died at a physician's house, yet no physician or other person who attended him was introduced as to the nature, extent, or location of the wound, or as to whether it was a bullet wound, nor as to what caused his death. John Jessup, a companion of deceased, testified that "Louis was shot at the Kansas and Gulf Short Line depot; he is dead; he died from being shot; died at Dr. Hicks's office; was shot in the stomach; defendant shot him." He also testified that he was at Dr. Hicks's office a few minutes after the deceased was shot, and that "the next time I saw him was about three or four o'clock Monday evening, and then again a few minutes after six; he died at six." This shows that he was not present when the deceased died. This witness does not testify that he ever saw the wound, nor as to its character, whether it entered the cavity, or whether it was at all serious.

Bob Jessup, also a hack-driver, and a companion of the deceased, testified: "I knew Louis McDougald; he is dead; Mr. High shot him; I suppose that was the cause of his death." This is the whole of the testimony touching the question of the cause of the death of Louis McDougald, and no excuse is shown why other evidence was not produced on that point.

No other questions are deemed of sufficient importance to require discussion. For the errors discussed, as to the charge of the court, the judgment is reversed, and the cause remanded.

MANSLAUGHTER — SELF-DEFENSE: See *Meuly v. State*, ante, p. 477, and note. Passion suddenly aroused from a lawful provocation will reduce a homicide from murder to manslaughter, because there is then no malice aforethought: *State v. O'Hara*, 92 Mo. 59.

MAIMING, WHAT NECESSARY TO CONSTITUTE CRIME OF: *Bowers v. State*, 24 Tex. App. 542; 5 Am. St. Rep. 901, and note 905. Specific intent or purpose to maim or disfigure is not an essential element of the crime of mayhem under the Tennessee statute: *Terrell v. State*, 86 Tenn. 523.

CORPUS DELICTI, PROOF OF: *People v. Palmer*, 109 N. Y. 110; 4 Am. St. Rep. 423, and note 431; *Gray v. Commonwealth*, 101 Pa. St. 380; 47 Am. Rep. 733; *Matthews v. State*, 55 Ala. 187; 28 Am. Rep. 698.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

**REARY v. LOUISVILLE, NEW ORLEANS, AND TEXAS
RAILWAY COMPANY.**

[40 LOUISIANA ANNUAL, 82.]

BAGGAGE-MASTER HAS NO AUTHORITY TO GRANT PERMISSION TO PERSONS TO RIDE on the cars of a railway train which is in charge of another person at the time. The granting of such permission is not within the scope of his employment, and cannot affect the rights or obligations of the company by which he is employed, especially where the permission is in direct violation of its rules and regulations.

RELATION OF CARRIER AND PASSENGER DOES NOT ARISE BETWEEN RAILWAY COMPANY AND CHILD, who, without permission from the person in charge of a train, enters a car for the purpose of taking a ride while the cars were being pulled back and forth at a railway station, with the intention of removing them from the track on which they had entered the station, and forming them into a train to be used next day.

RAILWAY COMPANY DOES NOT OWE SAME DEGREE OF CARE TO MERE STRANGERS unlawfully upon its premises that it owes to passengers conveyed by it. To such strangers it is liable only for injuries resulting from its negligent or tortious acts.

ONE WHO IN PANIC LEAPS FROM RAILWAY CAR WHILE IN MOTION, and is injured, cannot recover therefor in an action against the company, where such panic arose from causes with which it had no connection, and in which it had no agency.

ACTION for personal injuries. The opinion states the case.

Farrar and Kruttschnitt, for the appellant.

Braughn, Buck, Dinkelspiel, and Hart, for the appellee.

POCHE, J. Suing for the use of his minor child, plaintiff claims damages in the sum of ten thousand dollars for per-

sonal injuries inflicted on his child by one of the defendant's trains, through the alleged carelessness and negligence of the company's employees.

Defendant appeals from a judgment of three thousand dollars, based on the verdict of a jury.

The evidence is very conflicting on the salient features of the case, but from our reading of the record we find the following pertinent facts from the preponderance of the testimony:—

The accident occurred at the company's depot, which is situated on and occupies the neutral ground or space included between two streets or thoroughfares known as North and South Poydras streets, in this city, on a train of passenger-cars which had just arrived, had discharged its passengers and their baggage, and was being switched out of the main track, in order to be set at rest on a side-track for the night.

While plaintiff's daughter, between eight and nine years of age, was playing in and around the depot, with four other girls a little more advanced in years, one of whom was her sister of about thirteen years of age, the girls took a child's notion of riding on that train, while it was under the operation of being switched off, at about seven o'clock in the evening in the month of November, 1886.

One of the girls asked and obtained permission so to do, of the baggage-master of the train, who was standing near by, preparatory to his leaving for home.

Four of the girls entered one of the passenger-coaches and took seats at the end towards the baggage-car, and the fifth child caught on, and remained outside on the steps of the coach. As the train was in the act of being moved out of the main track, at a pretty rapid rate, the girls became alarmed at the belief and fear that the train was running out of the city, and going, as several of them say, "out to Baton Rouge," whereupon they ran out of the coach and precipitately jumped out of the car. It was in that flight that plaintiff's youngest daughter fell, and that her foot was seriously injured by being run over by one of the wheels of the coach.

Under that condition of things, the defendant makes the point that the baggage-master had no authority, within the scope of his employment, to grant the request of the children for permission to ride on the train, so as to render the company liable for injuries resulting from such permission. The record shows that the train was not under the charge or control of that employee, but that it was under the responsibility

of another and entirely different person, who had no knowledge of the presence of the girls on that train. The record is conclusive on that point, and the authorities are equally clear on the law. The baggage-master has no duty or authority with the train, whether running or at the depot; and his permission to the girls to ride on that train cannot bind or affect the rights or obligations of the company: *Pierce on Railroads*, 277; *Snyder v. Han. & St. J. R'y Co.*, 60 Mo. 413; *Gillett v. Missouri Valley R. R. Co.*, 55 Id. 315; 17 Am. Rep. 653; *Hanson v. Mansfield R. R. & Trans. Co.*, 38 La. Ann. 111; 58 Am. Rep. 162.

It is in proof that vigorous orders had been given by the management of the company to drive away children who came to play in and around their depot, and that to the knowledge of the girls many children have thus been ordered away. It is thus made clear that the permission given by the baggage-master was unauthorized under the scope of his employment, and in direct violation of the company's rules and regulations.

It is also in proof, beyond a doubt, and it is not disputed by plaintiff, that the train was not in use or motion, at the time of the accident, to carry passengers under its purpose as a common carrier, but that it was being pulled back and forth, merely and exclusively with the intention of removing the coaches from the track on which they had entered the depot, and of preparing them for the formation of another train for use in the company's business on the next day. Hence it clearly follows that the relations of carrier and passenger did not arise between the defendant and plaintiff's child.

Now, in one of the cases very strenuously relied on by plaintiff, the case of *Railroad Co. v. Stout*, 17 Wall. 657, the supreme court of the United States laid down the following pertinent rule: "That while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers, arising from its negligence or from its tortious acts."

The rule is not only supported by authority, but it finds its sanction in principles of reason, common sense, and natural justice. It is in fact a universal rule on the subject of the responsibility of common carriers.

But under the circumstances of this case, we feel warranted to extend the scope of the rule still further, and to hold the defendant company to the same degree of care towards the

children who were in that coach that it would owe to passengers being conveyed by it on a journey, after payment of their fare.

Our reading of the record has entirely failed to disclose any act of negligence or dereliction of any duty on the part of the company which it owed to those girls, even if they had been regular passengers on a journey over its road. An attempt has been made to show that the panic among the girls and their precipitate flight from the coach were caused by the act of one of the company's employees, who suddenly and without warning blew out the lights in the car, and his act is qualified as reckless and mischievous.

But that contention finds no support in the record. In their testimony, two of the girls state that they did not notice whether there were any lights in the coach or not; and not one of them is certain of having seen any person or persons put out the lights.

We are entirely satisfied from the evidence that the panic among the girls was caused by the fear that they might have made a mistake, and had entered a train which was going to Baton Rouge. Hence, impelled by that fear, they attempted to jump out while the train was in motion. Now, supposing that any passenger on a regular train should labor under a similar mistake, in believing, for instance, that the train was passing by the station to which he was destined, and fearing that he might be carried beyond the same, should jump out as the train was pulling out of the station, and be injured by falling, could the company be held liable for injuries thus received? Evidently not.

In that case, as in this, there would be no ground to conclude that the company had been guilty of any negligence towards the passenger on its train. Where is the duty which the defendant corporation owed to plaintiff's child, and which it did not discharge or perform?

By remaining on the coach until it had been switched off on the side-track, she would have been perfectly safe; and could have stepped out, as she and her companions had doubtless intended to, and as they knew that they could do without the slightest danger.

Who is responsible for the ungrounded fear of the girls that the train was being run out of the city, or perhaps to Baton Rouge, and which is beyond a doubt the proximate cause of the accident? They were alone in a coach, where they had

entered voluntarily, with the childish intention of taking a ride while the train was being switched off. They say themselves that after they had taken their seats in the coach, the baggage-master moved from the platform in front of them, and entered the baggage-car, where his duty called him.

There is no pretense that a single word was spoken to them after they had taken their seats in the coach by any officer, servant, or other employee of the company, or that they were ordered off the train by any one. In running out and jumping off they were impelled by motives with which the company had not the remotest connection or agency.

And in that feature the circumstances of the case are much more favorable to the company than in any of the reported cases on which her counsel rely in their brief: *Cauley v. Pittsburg etc. R'y Co.*, 95 Pa. St. 395; 40 Am. Rep. 664; 98 Pa. St. 498; *Duff v. Allegheny etc. R. R. Co.*, 91 Id. 458; 36 Am. Rep. 675.

Under our view of the case, and from our solution of the pertinent facts flowing from the weight of evidence, we hold that the pivotal question does not hinge on the contributory negligence of the passenger, but exclusively on the entire absence of negligence of the company: *Flowers v. Pennsylvania R. R. Co.*, 69 Pa. St. 210; 8 Am. Rep. 251.

Our opinion is, that the verdict of the jury is manifestly erroneous, and that in justice it must be set aside.

It is therefore ordered, adjudged, and decreed that the verdict of the jury be set aside, and the judgment of the district court annulled, avoided, and reversed, and it is further ordered that plaintiff's demand be rejected, and his action dismissed at his costs in both courts.

LIABILITY OF RAILROAD COMPANY FOR INJURIES SUSTAINED BY ONE WHILE RIDING AS PASSENGER on freight-car or hand-car, under invitation of an employee of the company: *McGee v. Missouri Pacific R. R. Co.*, 92 Mo. 208; 1 Am. St. Rep. 706, and note 712; *International etc. R. R. Co. v. Cook*, 68 Tex. 713; 2 Am. St. Rep. 521, and note 524.

CARE EXACTED OF RAILROAD COMPANY TOWARDS trespassers on its premises: See *Louisville etc. R. R. Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155, and note 163; *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521.

LAW HAS SO HIGH REGARD FOR HUMAN LIFE that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons: *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502; 3 Am. Rep. 721.

ONE WHO BUYS TICKET OVER RAILROAD, AND BY MISTAKE TAKES PASSAGE ON WRONG TRAIN, is a passenger so far as to entitle him to protection

against the negligence of the company: *Cincinnati etc. R. R. Co. v. Carper*, 112 Ind. 26. Passenger on a railway car who sustains injury by reason of the malicious act of one not in the employ of the company, whereby the car was derailed, is not entitled to recover for the damage inflicted: *Houston etc. R. R. Co. v. Lee*, 69 Tex. 556; and see *Sachowitz v. Atchison etc. R. R. Co.*, 37 Kan. 212.

CITY OF NEW ORLEANS v. GREAT SOUTHERN TELEPHONE AND TELEGRAPH COMPANY.

[40 LOUISIANA ANNUAL, 41.]

IMPOSITION BY MUNICIPAL ORDINANCE OF CERTAIN ANNUAL CHARGE PER POLE, as "a consideration for the privilege," upon the poles of a telephone company already established, and paying taxes on its property and a license for carrying on its business, is neither a tax nor a license, nor an exercise of the taxing power in any respect. Nor can it be upheld as a police regulation, since it involves no consideration whatever of public morals, health, or convenience.

MUNICIPAL ORDINANCE, WHEN A CONTRACT. — A municipal ordinance which grants to a company authority to construct and maintain telephone lines on the streets of a city, without any limitation as to time, and for a consideration therein named, is, when accepted and acted upon by the grantee by complying with its conditions and constructing a valuable plant, a contract with the city, which cannot thereafter be abolished or altered in its essential terms without the consent of the grantee.

PROVISO IN MUNICIPAL ORDINANCE GRANTING FRANCHISE TO COMPANY, that its acts and doings under the ordinance shall be subject to future ordinances of the city, does not convert the grant into a mere revocable permit. It merely subjects such acts and doings to municipal regulations not conflicting with the ordinance itself.

PETITION for an injunction. The opinion states the case.

Walter H. Rogers and Branch K. Miller, for the appellant.

Bayne, Denegre, and Bayne, for the appellee.

FENNER, J. The defendant is the assignee and successor of the New Orleans Telephonic Exchange, referred to in the following ordinance of the city of New Orleans, adopted February 18, 1879:—

"An ordinance authorizing the construction and maintenance of a telephonic telegraph line through the streets of the city of New Orleans.

"Sec. 1. Be it ordained by the city council of the city of New Orleans, that the New Orleans Telephonic Exchange is hereby authorized to construct and maintain a line or lines of telegraphs through the streets of this city, the line or lines to be constructed along such streets, at such points, and in such

manner, as to the kind and position of the telegraph poles, the height of the wires above the streets, and in all other particulars, as the administrator of the department of improvements of this city may direct; *provided, however*, that the said company shall connect their wires with the mayor's office, chief of police's office, and fire alarm telegraph office, and place and keep telephones therein free of charge to the city, so that said telephones may be used in connection with all wires under the control of said company.

"Sec. 2. And be it further ordained, etc., that all the acts and doings of said company under this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the city council concerning the same."

Under this ordinance, defendant constructed and has since maintained telephonic lines through the streets, built according to the directions of the administrator of improvements, and with his approval, and has furnished the city with the free telephonic service stipulated, and has complied in all respects with the terms of the ordinance.

The plant established by defendant is expensive and valuable. The defendant pays a tax upon this plant as property, and also pays a license tax levied on its business.

In April, 1880, the general assembly of the state passed act No. 124, authorizing corporations formed for the purpose of transmitting intelligence by magnetic telegraph or telephone to "construct and maintain telegraph, telephone, and other lines along all state, parish, or public roads or public works, and along and parallel to any of the railroads in the state, and along and over the waters of the state; *provided*, that the ordinary use of such roads, works, railroads, and waters be not thereby obstructed, and along the streets of any city, with the consent of the council or trustees thereof."

The defendant, having the prior consent of the city, certainly came under the protection of this act, as to the maintenance of its lines from the date of its passage.

In December, 1883, the city council passed "an ordinance to regulate and control the erection and maintenance of poles for supporting wires of the telephones within and on the streets, ways, and public places of the city of New Orleans," containing various provisions on the general subject, with none of which have we any present concern, except the following: That "no poles shall be allowed to be erected, or any existing poles be allowed to remain, in that portion of the city embraced

by Jackson Street, Elysian Fields, Roman Street, and the Mississippi River, except upon the payment of five dollars per annum per pole for every such pole erected, or at present in use within that section of the city, . . . said payments to be in consideration of the privilege and advantage of entering upon, using, and permanently occupying the streets, ways, and places of the city for private property, and to be paid annually, in advance, commencing January 1, 1884."

Defendant had six hundred poles within the section designated, on which the sum of three thousand dollars is claimed to be due, and the object of the present action is to enjoin defendant from using or maintaining said poles for telephonic purposes until payment thereof be made.

It is not pretended that the exaction claimed is a tax, either on property or as a license, or that it is an exercise of the taxing power in any respect.

The ordinance qualifies it as a price or consideration for the privileges enjoyed. It is not even alleged that defendant has ever consented or contracted to pay such consideration, and the attempt made to prove such consent was not only *ultra petitionem*, but the evidence offered for the purpose was manifestly insufficient and illegal, and was properly rejected.

There is therefore entire absence of any legal tie binding the defendant, as a debtor, for the amount claimed, and if the city were suing simply for a money judgment, the petition would set forth no cause of action.

The real relief claimed by the city, however, is found in the injunction prayed for, based on the theory that the provision of the ordinance referred to is a regulation or condition imposed upon the maintenance of the poles and exercise of the privileges which the city had the right to impose, and without compliance with which the defendant could not lawfully continue to maintain and exercise them.

The question for our determination is, whether the city had the right to make such a regulation or impose such condition.

It is not seriously contended that the provision is a police regulation, and indeed, such contention is silenced not only by the nature but by the express terms of the provision itself, which qualify the exaction as a "consideration for the privilege." No consideration whatever, of public morals, health, or convenience, is involved. It is not proposed to abolish the use of poles, or to alter their location, construction, or manner of use in any way, to subserve the public comfort.

The simple requirement is the payment of a price, on payment of which the *status quo* continues, while without such payment it must cease. The case presents no feature of an exercise of the police power.

The only remaining question is, whether, after granting the defendant the authority to construct and to maintain its lines without limitation as to time, and with no other consideration than the furnishing of certain free telephonic facilities to the city,—after the defendant has, at great expense, established its plant, and constructed its lines, and when it has fully complied with all the conditions imposed,—the city can now exact this large additional consideration for the continued enjoyment of privileges already granted.

If the city can do this now, she could have done it the very day after the defendant had completed its lines, when it had incurred all the expense, and before it had reaped a particle of return. If she can impose a charge of five dollars per pole, she can with equal power impose one of one thousand dollars, and, for that matter, she could arbitrarily revoke the grant at her pleasure.

Either she is bound according to the terms of her proposition accepted and acted on by defendant, or she is not bound at all.

Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside, or to interpolate new and more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the *Darmouth College* case, 4 Wheat. 518.

The main contention of the city, however, is, that the second section of the ordinance robs it of the features of a contract, and converts the authority granted into a mere revocable permit. The section is as follows: "That all the acts and doings of said company under this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the city council concerning the same."

The city's construction of this section is strained and unreasonable, and conforms neither to its spirit or letter.

It is not conceivable that the grantee would have invested its means in such an enterprise had it imagined that the term and conditions of its enjoyment of the privilege lay at the entire mercy of the city. If any such unreasonable intention

lurked in the minds of the council which passed the ordinance, the grantor, under familiar rules of construction, came under the obligation of expressing it clearly and unambiguously.

But what is it that is subject to regulation and control by future ordinances?

It is "the acts and doings of said company under this ordinance." This assumes that the ordinance itself is to continue in full force and effect, and certainly reserves no power to repeal, destroy, or alter it in any of its essential features and considerations. It recognizes the right of the company to act and to do under and according to the ordinance, only subjecting such "acts and doings" to municipal regulations not conflicting with the ordinance itself.

We consider that the imposition of the additional and burdensome consideration here involved is not within the scope of the rights reserved.

Judgment affirmed.

WHAT IS A TAX, AND WHAT IMPOSITIONS MAY BE SUSTAINED AS EXERCISES OF THE TAXING POWER. — 1. *What is a Tax.* — "Taxes are the enforced proportional contributions from persons and property, levied by the state, by virtue of its sovereignty, for the support of government, and for all public needs": Cooley on Taxation, 2d ed., 1. "Taxes are defined to be burdens or charges imposed by the legislative power of a state, upon persons or property, to raise money for public purposes": Blackwell on Tax Titles, 4th ed., 1; *Judd v. Driver*, 1 Kan. 462; *Knowlton v. Supervisors of Rock County*, 9 Wis. 418. "Taxes are a ratable portion of the produce of the property and labor of the individual citizens, taken by the nation, in the exercise of its sovereign rights, for the support of the government, for the administration of the laws, and as the means for continuing in operation the various legitimate functions of the state": Blackwell on Tax Titles, sec. 2. "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes, or to accomplish some governmental end": Dillon, C. J., in *Hanson v. Vernon*, 27 Iowa, 47. "A tax is a charge upon persons or property to raise money for public purposes": Field, C. J., in *Perry v. Washburn*, 20 Cal. 350. "Taxes are the enforced proportional contribution of each citizen and of his estate, levied by the authority of the state for the support of government and for all public needs": *Opinion of the Judges*, 58 Me. 591. "A tax is an impost levied by authority of government, upon its citizens or subjects, for the support of the state": Green, C. J., in *City of Camden v. Allen*, 26 N. J. L. 398. "Taxes are burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes, or to defray the necessary expenses in administering the government. They are contributions levied on individuals for the service of the state": Wagner, J., in *Glasgow v. Rowse*, 43 Mo. 489. "A tax is an imposition for the supply of the public treasury, and not for the supply of individuals or private corporations, however benevolent they may be":

Lowrie, C. J., in *Philadelphia Association v. Wood*, 39 Pa. St. 82. "Taxes are a public imposition, levied by authority of the government, for the purpose of carrying on the government in all its machinery and operations": Coulter, J., in *Northern Liberties v. St. John's Church*, 13 Id. 107. "What are taxes but the revenue collected from the people, for objects in which they are interested, — the contributions of the people, for things useful and conducive to their welfare?" Agnew, J., in *Hilbish v. Catherman*, 64 Id. 159. "In a general sense, taxes are burdens or charges imposed by the legislative power of a state upon persons or property for public uses": Lyon, J., in *Hale v. City of Kenosha*, 29 Wis. 605. "Taxes are charges imposed by or under the authority of the legislature, upon persons or property subject to its jurisdiction": Rhodes, J., in *People v. McCreery*, 34 Cal. 454. "The word 'taxes' means burdens, charges, or impositions, put or set upon persons or property for public uses": *Matter of Mayor etc. of New York*, 11 Johns. 80; *Mitchell v. Williams*, 27 Ind. 63. "Taxation is that tribute for the support of government imposed on property in return for the protection and advantages which the government affords to the owner": Bartley, C. J., in *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 10. "Taxes are defined to be rates or sums of money assessed on the personal property of citizens by government, for the use of the nation or state; or, as the government sometimes exacts from individuals services as well as money, a more enlarged and correct definition would be, that they are burdens or charges imposed by the legislative power of a state upon persons or property for public uses": Dixon, C. J., in *Knowlton v. Supervisors of Rock County*, 9 Wis. 418.

An analysis of the definitions given shows that a tax is an enforced proportional imposition or burden upon person or property; that it is imposed by the legislature, or by its authorization, in the exercise of the sovereign power of the state; that it can be imposed only for a public or governmental purpose, and that it can only be imposed upon persons and property within the jurisdiction of the taxing sovereignty or power. A tax is not a debt in the ordinary acceptance of that term. "It is not founded upon contract; it does not establish the relation of debtor and creditor between the tax-payer and the state; it does not draw interest; it is not the subject of attachment; and it is not liable to set-off": Field, C. J., delivering the opinion of the court in *Perry v. Wasliburn*, 20 Cal. 350; *Cooley on Taxation*, 2d ed., 15; *Finnegan v. Fernandina*, 15 Fla. 379; 21 Am. Rep. 292; *Andover Turnpike Corporation v. Gould*, 6 Mass. 40; 4 Am. Dec. 80; *Pierce v. Boston*, 3 Met. 520; *Hibbard v. Clark*, 56 N. H. 155; 22 Am. Rep. 432; *City of Camden v. Allen*, 26 N. J. L. 398; *Webster v. Seymour*, 8 Vt. 135; *Johnson v. Howard*, 41 Id. 122; 98 Am. Dec. 568; *Town of St. Albans v. National Car Co.*, 57 Vt. 84. In *San Francisco v. London & L. & G. Ins. Co.*, 74 Cal. 113, 5 Am. St. Rep. 425, it was held that the exaction imposed by a statute which required every agent of a foreign insurance company doing business in the state to pay into the treasury of the county a sum equal to one per centum of the amount of all premiums paid or agreed to be paid to such agent for insurance effected by him within such county, the money when paid to constitute a fund to be known as the firemen's relief fund of such county, was a tax. Temple, J., who delivered the opinion in that case, said: "We come now to the inquiry, Is the exaction here in question a tax? The statute itself denominates it a tax, and it must be confessed that it has all the characteristics of a tax. It is a charge imposed by the legislature for the purpose of revenue. It is not founded upon contract, and does not establish the relation of debtor and

creditor. It is an enforced proportional contribution, levied by authority of the state, and, as respondent claims, for public needs."

2. *What Impositions or Exactions may be Sustained as Exercises of the Taxing Power.*—The taxing power of the legislature, when unrestricted by constitutional limitation, is most extensive. Judge Cooley says: "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise, or privilege, or occupation, or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes. And not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limits, and may be carried to any extent which the government may find expedient. It may therefore be employed again and again upon the same subjects, even to the extent of exhaustion and destruction, and may thus become in its exercise a power to destroy": Cooley on Taxation, 2d ed., 5.

The legislature has an undoubted right to tax all offices and posts of profit, trades, professions, and occupations: *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *City of Newton v. Atchison*, 31 Kan. 151; 47 Am. Rep. 486; *Connecticut M. L. I. Co. v. Commonwealth*, 133 Mass. 161; *Simmons v. State*, 12 Mo. 268; 49 Am. Dec. 131; *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *People v. Equitable Trust Co.*, 96 N. Y. 396; *Brown's Appeal*, 111 Pa. St. 72; *Ould v. City of Richmond*, 23 Gratt. 464; 14 Am. Rep. 139; *Commonwealth v. Moore*, 25 Gratt. 951; *Veazie Bank v. Fenno*, 8 Wall. 533; *People v. Naglee*, 1 Cal. 232; 52 Am. Dec. 312, note 331-335, where the power of the state to exact licenses and charge therefor is discussed at length. In the case of *People v. Equitable Trust Co.*, 96 N. Y. 396, Earl, J., delivering the opinion of the court, said: "The legislature can constitutionally impose the same poll tax upon every citizen without reference to his ability to pay. So it can impose a tax upon all watches, carriages, pianos, dogs, spirituous liquors, and other chattels, without reference to their value. On the same principle, it can impose an arbitrary tax upon any avocation or business without estimating its volume or value. It may impose a specific tax upon any saloon-keeper, or hotel-keeper, or banker, or broker, or trader." A state may impose a tax on a foreign corporation as a condition upon which it may enter the state and do business in it, and it may discriminate against such corporations in the imposition of taxation upon them: *Commonwealth v. Milton*, 12 B. Mon. 212; 54 Am. Dec. 522; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *People v. Equitable Trust Co.*, 96 N. Y. 387; *People v. Gold & S. T. Co.*, 95 Id. 67; *People v. Horn Silver M. Co.*, 105 Id. 76; *Commonwealth v. Germania L. I. Co.*, 11 Phila. 533; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; 96 Am. Dec. 331, note 338-345, where this subject is considered at length.

The legislature of a state may impose a tax on the transmission of estates by devise or descent, notwithstanding a provision in its constitution requiring that taxes shall be equal and uniform: *Eyre v. Jacob*, 14 Gratt. 422; 73 Am. Dec. 367; *Schoolfield's Ex'r v. City of Lynchburg*, 78 Va. 366; *Matter of McPherson*, 104 N. Y. 306; 58 Am. Rep. 502. *Contra*, *Curry v. Spencer*, 61 N. H. 624; 60 Am. Rep. 337. Earl, J., in delivering the opinion of the court in the *Matter of McPherson*, *supra*, said: "Taxes upon legacies and inheritances have been approved generally by writers on political economy and systems of taxation, and no tax can be less burdensome and interfere less with the productive and industrial agencies of society." A tax imposed on

each suit at law, to be paid by the unsuccessful party, is valid: *Harrison v. Willis*, 7 Heisk. 35; 19 Am. Rep. 604; *State v. Board of County Comm'rs*, 4 Neb. 537; 19 Am. Rep. 641. And a statute imposing a fee of six dollars in each case decided by the supreme court of Alabama, for the benefit of the state library, was held to be a valid exercise of the taxing power: *Swann v. Kidd*, 79 Ala. 431. A state legislature has power to impose a tax on the gross receipts of railroad, express, and telegraph companies, although part of such receipts is from business done between points in the state and points without it: *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Osborne v. Miller*, 16 Id. 479; *Western U. T. Co. v. State Board of Assessment*, 80 Ala. 273; *Southern Express Co. v. Hood*, 15 Rich. 66; 94 Am. Dec. 141. And a convention ordinance providing that an annual tax of ten and fifteen per cent on the gross earnings of a railroad company should be paid to the state in lieu of all other taxation, to be applied in payment of the debt due from the state on the bonds issued to the company by the state, was held to be a valid exercise of the taxing power: *North Missouri R. R. Co. v. Maguire*, 49 Mo. 490; 8 Am. Rep. 141. But in *Erie R'y Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226, it was held that an act of the legislature of New Jersey relating to corporations doing business in that state, not being corporations of that state, which provided that every such company should pay a transit duty of three cents on every passenger and two cents on every ton of goods carried by it in the state for any distance exceeding ten miles, was unconstitutional, because in conflict with the provisions of the federal constitution giving to Congress exclusive power to regulate commerce among the several states.

It is a legitimate exercise of the taxing power, and not an attempt to exercise the right of eminent domain, for the legislature to authorize the whole cost of an improvement to be assessed upon lands benefited: *City of Bridgeport v. New York & N. H. R. R. Co.*, 36 Conn. 255; 4 Am. Rep. 63; *Garrett v. City of St. Louis*, 25 Mo. 505; 69 Am. Dec. 475; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; 72 Am. Dec. 276; *Hill v. Higdon*, 5 Ohio St. 243; 67 Am. Dec. 289; *Hammett v. Philadelphia*, 65 Pa. St. 146; 3 Am. Rep. 615; *Soens v. City of Racine*, 10 Wis. 271; *Dalrymple v. City of Milwaukee*, 53 Id. 178; *People v. Mayor of Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266, note 285-290, where this subject is discussed at length. But in *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615, an act of the legislature of Pennsylvania which authorized a street already laid out and in good condition to be taken and improved for a public drive or carriage-way, and provided that the expense of the improvements should be assessed upon the property located on the street, was held to be unconstitutional, because it imposed a local assessment for improvements which were for the general public benefit. Sharswood, J., who delivered the opinion of the majority of the court in that case, said: "Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed or appears to be for general public benefit." And in *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634, it was held that while the cost of a public improvement may be imposed upon the property peculiarly benefited, the cost beyond this measure must be levied on the public at large. Beasley, C. J., in delivering the opinion of the court in that case, said: "A legislative act, authorizing the building of a public bridge, and directing the expenses to be assessed on A, B, and C, such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the

money of the persons designated to a public use." So in *McBean v. Chandler*, 9 Heisk. 349, 24 Am. Rep. 308, where the state constitution required all property to be taxed according to its value, it was held that a city ordinance authorizing the city to charge the cost of improving a street on the adjoining lots in proportion to their respective fronts was unconstitutional and void. See also *Jones v. Board of Water Commissioners*, 34 Mich. 273.

The constitutions of most of the states provide for uniformity and equality in the imposition of the burdens of taxation. Where such constitutional limitations exist, statutes which do not apportion taxes equally are void. Taxes are equal and uniform when no person or class of persons in the territory taxed is taxed at a higher rate than are other persons in the same district upon the same value or thing, and when the objects of taxation are the same by whomsoever owned or whatever they be: *Norris v. City of Waco*, 57 Tex. 635; *City of Lexington v. McQuillan's Heirs*, 9 Dana, 513; 35 Am. Dec. 159. In *Livingston v. City of Paducah*, 80 Ky. 656, a statute imposing a tax of three dollars on every vehicle kept in a city was held to be invalid, as imposing a tax grossly unequal and disproportionate to the taxes on other property. A city ordinance imposing a tax of fifteen cents on every thousand pounds of tobacco sold in the town, without regard to the value of the tobacco, is void, as imposing an unequal tax: *Town of Danville v. Shelton*, 76 Va. 325. A statute which imposes a tax on the gross receipts of some railroad companies, and upon the capital stock of others, is void for inequality: *Worth v. Wilmington & W. R. R. Co.*, 89 N. C. 291; 45 Am. Rep. 679. For the same reason, a law imposing a tax on the owners of sleeping-cars for running them over the railway of another, but exempting the act of running the same kind of cars over the road of the owners, is unconstitutional: *Pullman Palace Car Co. v. State*, 64 Tex. 274; 53 Am. Rep. 758. In Wisconsin all kinds of property must be taxed uniformly, or be absolutely exempted: *Knowlton v. Supervisors of Rock County*, 9 Wis. 410. A city ordinance which requires a license fee of one hundred dollars for selling meat in one part of a city, and of twenty-five dollars only for selling it in other parts of the city, is void for inequality: *City of St. Louis v. Spiegel*, 75 Mo. 145. A law declaring a tax on the polls and property of persons of one color, for the exclusive education of children of that color, is void for lack of uniformity: *Puitt v. Commissioners of Gaston County*, 94 N. C. 709; 55 Am. Rep. 638. And in *State v. Express Co.*, 60 N. H. 219, an act of the legislature of New Hampshire which required every expressman to pay annually to the state for a license either two per cent of the gross receipts of his business, or five dollars per mile, was held to be in violation of the constitutional provision of that state, which gives to the legislature power "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of and residents within the said state, and upon all estates within the same."

It is a well-established principle of law that taxation can only be imposed for public purposes, and that taxes cannot be rightfully imposed for the purpose of aiding private business undertakings: *Cooley on Taxation*, 2d ed., 115; *Loan Ass'n v. Topeka*, 20 Wall. 655; *Davis v. Gaines*, 48 Ark. 370; *Anderson v. Kerns D. Co.*, 14 Ind. 199; 77 Am. Dec. 63; *National Bank v. City of Iowa*, 9 Kan. 689; *Opinion of Judges*, 58 Me. 591; *Allen v. Inhabitants of Jay*, 60 Id. 124; *Jenkins v. Andover*, 103 Mass. 94; *Lowell v. City of Boston*, 111 Id. 454; 15 Am. Rep. 39; *People v. Township Board of Salem*, 20 Mich. 452; 4 Am. Rep. 400; *State v. Foley*, 30 Minn. 350; *Coates v. Campbell*, 37 Id. 498; *Weismer v. Village of Douglas*, 64 N. Y. 91; 21 Am. Rep. 586; *Sharpless v.*

Mayor of Philadelphia, 21 Pa. St. 147; 59 Am. Dec. 759; *Grim v. Weissenberg S. D.*, 57 Pa. St. 433; 93 Am. Dec. 237; *Philadelphia Ass'n v. Wood*, 39 Pa. St. 73; *Soens v. City of Racine*, 10 Wis. 271; *Brodhead v. Milwaukee*, 19 Id. 624; 88 Am. Dec. 711; *Curtis v. Whipple*, 24 Wis. 350; 1 Am. Rep. 187; *Whiting v. Sheboygan etc. R. R. Co.*, 25 Wis. 167; 3 Am. Rep. 30; *Commercial Bank of Cleveland v. City of Iola*, 2 Dill. 353. In *National Bank v. City of Iola*, 9 Kan. 702, Dillon, J., in delivering the opinion of the court, said: "I hold it to be sound doctrine that the mere incidental benefits to the public or the state, which result from the pursuit by individuals of ordinary branches of business or industry, do not constitute a public use in the sense which justifies the exercise of either the power of eminent domain or of taxation. If this salutary principle be abandoned, we unsettle the foundations of private property, and unwisely open the door for frauds and abuses of the most alarming character." But the legislature may impose a tax for the payment of claims not strictly legal, but founded in equity and justice, in the largest sense of those terms, or in gratitude or charity: *Friend v. Gilbert*, 108 Mass. 408; *Freeland v. Hastings*, 10 Allen, 570; *Kunkle v. Town of Franklin*, 13 Minn. 127; 97 Am. Dec. 226; *Town of Guilford v. Supervisors of Chenango County*, 13 N. Y. 143; *Grim v. Weissenberg School District*, 57 Pa. St. 433; 98 Am. Dec. 237; *Hilbish v. Catherman*, 64 Pa. St. 154; *Brodhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711; *State v. Tappan*, 29 Wis. 664; 9 Am. Rep. 622. Denio, J., delivering the opinion of the court in *Town of Guilford v. Supervisors of Chenango Co.*, 13 N. Y. 149, said: "The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it, and it is the judge of what is for the public good." But a tax cannot be imposed to raise money to refund money given to a town or state without expectation of repayment: *Davis v. Guines*, 48 Ark. 370; *Perkins v. Milford*, 58 Me. 315. Nor have towns authority to impose a tax to raise money to pay militia, or for other purposes of defense: *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145. Railroads are now generally admitted to be such public uses as will justify the exercise of the taxing power to raise money to aid them: See a full discussion of this subject in the note to *Sharpless v. Mayor of Philadelphia*, 59 Id. 782-788.

The power to tax is necessarily limited to subjects within the jurisdiction of the state. The legislature of a state has no power to require the treasurer of a corporation of a state to pay to the state a percentage of the interest or dividends due on its shares of stock held by non-resident share-holders: *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Oliver v. Washington Mills*, 11 Allen, 268. The question where property may be taxed is fully discussed in the note to *City of New Albany v. Meekin*, 56 Am. Dec. 523-537. A city may tax lands lying within its corporate limits, although it is used for agricultural purposes exclusively: *Turner v. Althaus*, 6 Neb. 54. But see *City of Covington v. Southgate*, 15 B. Mon. 491.

A corporation cannot be taxed on the value of the debts which it owes. Debts are not property of the debtors, but of the creditors, and in the latter's hands only can they be taxed: *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Porter v. Rock Island etc. R. R. Co.*, 76 Ill. 561.

The right to acquire and keep any particular species of property cannot be

taxed as a privilege: *Stevens v. State*, 2 Ark. 291; 35 Am. Dec. 72; *Gibson v. County of Pulaski*, 2 Ark. 309; *Mayor of Washington v. Meigs*, 1 McArthur. 53; 29 Am. Rep. 578.

A state statute requiring all drummers to pay a sum for the privilege of making sales on behalf of persons residing and doing business in another state is a regulation of commerce between the states, and violative of the constitution of the United States. A state cannot tax interstate commerce at all, even though it imposes a like tax on its own domestic commerce: *Robbins v. Shelby Co. T. Dist.*, 120 U. S. 489.

MUNICIPAL ORDINANCES, VALIDITY OF: *Ex parte Byrd*, 84 Ala. 17; 5 Am. St. Rep. 328, and note 331; *Poyer v. Village of Desplaines*, 123 Ill. 111; 5 Am. St. Rep. 494; *Matter of Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310, and note 319. Right of city to enact ordinances regulating railways using the streets of the city: *City etc. Ry Co. v. Mayor*, 77 Ga. 731; 4 Am. St. Rep. 106, and note 108.

WILLIAMS v. PULLMAN PALACE CAR COMPANY.

[40 LOUISIANA ANNUAL, 87.]

SLEEPING-CAR COMPANY IS NOT LIABLE AS COMMON CARRIER FOR INJURY TO STRANGER, who, upon entering one of its cars to ask the privilege of washing his hands, is wantonly and without provocation assaulted and beaten by the porter of the car. There is, in such case, no contractual relation between the stranger and the company, and its responsibility, if it exists, must be found in the general principles of the law of master and servant as applicable to all masters similarly situated.

MASTER IS LIABLE FOR DAMAGE OCCASIONED BY HIS SERVANTS in the exercise of the functions in which they are employed. And the tendency of modern jurisprudence is to hold him liable, not only for the negligence, but also for the torts of his servants, when done within the scope of their employment.

PORTER OF SLEEPING-CAR HAS NO AUTHORITY TO ENFORCE RULES and regulations of the company, or to forcibly prevent any person from entering the car, or to expel him therefrom after he has entered, and if he wantonly assaults and beats one who enters the car for a lawful purpose, his act is outside of the functions in which he is employed, and the company will not be liable therefor, unless it had expressly or impliedly authorized the act, or been guilty of knowingly employing a dangerous servant.

SLEEPING-CAR COMPANY IS NOT NEGLIGENT IN EMPLOYING PORTER who, for three years in its service, had borne a good character for sobriety, amiability, and politeness.

RATIFICATION CANNOT BE INFERRED FROM ACTS WHICH MAY BE READILY EXPLAINED without involving any intention to ratify. A company cannot, therefore, be held to have ratified an assault and battery committed by its servant, by retaining him in its service, where it believed his account of the affair, and thought it just to maintain the *status quo* until a judicial determination of the matter had been had. Nor is the case affected by the fact that the servant was criminally convicted of assault and battery, where he was not permitted to testify in his own defense, and he might have been so convicted on evidence falling far short of the outrage charged.

ACTION for damages. The opinion states the case.

Alfred Ennis and Percy Roberts, for the appellant.

W. S. Benedict, and Read and Goodale, for the appellee.

FENNER, J. This is an action for damages for an injury inflicted by a servant of the defendant employed as porter on one of its cars.

Plaintiff alleges that he had purchased a ticket, and was a passenger on a train of the Louisville, New Orleans, and Texas Railway Company, between Zacharie station and Baton Rouge, in this state; that, having soiled his hands, he went to the wash-basin in the ordinary coach of the train to cleanse them, but found there was no water, and on application to a porter or brakeman of the car, he was told, "Just step back in the sleeper, and you will find water, towels, comb, and brush"; that thereupon he went back to the sleeper, the door of which was opened by the porter of the sleeping-car, stepped just within the door, and asked said porter if he could wash his hands, when the latter replied in a rude and insulting manner: "Well, sir, if you do, you will pay for it"; that plaintiff jestingly and good-humoredly replied: "You would not think of charging a man anything to wash, when we have so much water in this country?" whereupon, before plaintiff made any further advance in the car, the said porter, John Wiley, suddenly, with a jerk, pulled down plaintiff's hat over his eyes, and with some blunt instrument struck petitioner a violent blow on the head, cutting through the hat into the scalp, making a ghastly wound, and knocking your petitioner senseless out on the platform of the car, where he lay at the imminent peril of his life (the train going at full speed), until rescued by persons who saw him from the adjoining car, the said Wiley having, as soon as he had thus disposed of petitioner, slammed and fastened the door of the coach, leaving him to his fate.

Such are the allegations of the petition, confirmed, almost *totidem verbis*, by the testimony of plaintiff, who is shown by the record to be a gentleman of social position and excellent character.

The porter, of course, tells a very different story, which, if true, would place plaintiff in such precedent fault as would clearly bar his action for damages, even if it did not fully justify the assault and battery in the eyes of the criminal law.

But the jury evidently believed the plaintiff, and, without needless comment, the evidence in the record furnishes no ground for reversing their conclusion, notwithstanding the almost incredible character of the statement.

The case presents for our determination two questions, viz.:

1. Is the defendant responsible for such acts of its servants as those complained of? 2. If not originally liable, has it become so, in this case, by ratification of its servant's conduct?

1. Plaintiff was not a passenger on defendant's car, and there was no contractual relation of any kind between them.

The case, therefore, does not fall within that numerous class of authorities which enforce the obligations of the common carrier, under its contract of carriage, towards its passengers.

Counsel for plaintiff has rested the law of his case almost wholly upon a recent learned decision of the supreme court of Maine, where a railroad company was held responsible for insult, abuse, and assault by its brakeman upon a passenger, almost as wanton and unprovoked as that charged in the instant case. But a reference to the case shows that the responsibility was imposed solely on the ground of the contract of carriage. Thus, after stating the evidence, the court said: "Upon this evidence, the defendants contend that they are not liable, because, as they say, the brakeman's assault upon the plaintiff was willful and malicious, and was not, directly or indirectly, authorized by them. They say the substance of the whole case is this: that 'the master is not responsible as a trespasser, unless, by direct or implied authority to the servant, he consents to the unlawful act.' The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger and the duty which he owes to a stranger. It may be true that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. He must not only protect his passengers against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants. . . . This liability of the master is very clearly expressed in a recent case in Massachusetts.

The court say that wherever there is a contract between the master and another person, the master is responsible for the acts of his servant in executing that contract, although the act is fraudulent and done without his consent: *Howe v. Newmarch*, 12 Allen, 55. And Messrs. Angell and Ames, in their work on corporations, section 388, say: 'A distinction exists as to the liability of a corporation for the willful tort of its servant toward one to whom the corporation owes no duty except such as each citizen owes to every other; and that towards one who has entered into some peculiar contract with the corporation by which such duty is increased; thus it has been held that a railroad corporation is liable for the willful tort of its servants, whereby a passenger on the train is injured': *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202; 2 Am. Rep. 39.

The court, in its opinion, refers to many authorities, all tending in the same direction, but further quotation is needless. Perhaps the principle was never more clearly expressed or placed on a sounder basis of reason than by our own court, which has thus formulated it: "When the proprietors of vessels use them for the purpose of carrying passengers for money, they subject themselves to the same responsibility for a breach of duty in their officers to those passengers as they would for their misconduct in regard to merchandise committed to their care. No satisfactory distinction can be drawn between the two cases": *Keene v. Lizardi*, 5 La. 431; 25 Am. Dec. 197.

The absence of any contractual relation between plaintiff and defendant removes this case from the application of the line of authorities above indicated. The responsibility of defendant, if it exists, must be found in the general principles of the law of master and servant as applicable to all masters similarly situated.

The Civil Code of this state enunciates the rule of *respondeat superior* in terms which exactly correspond to the rule of the common as well as the civil law: "Masters and employers are answerable for the damage occasioned by their servants and overseers in the exercise of the functions in which they are employed."

As is well said by Judge Cooley: "It will readily occur to every mind that the master cannot, in reason, be held responsible generally for whatever wrongful conduct a servant may be guilty of. A liability so extensive would make him

guarantor of the servant's good conduct, and would put him under a responsibility which prudent men would hesitate to assume."

The earlier doctrine of the common law affirmed the rule that "in general a master is liable for the fault or negligence of the servant, but not for his willful wrong or trespass": 2 Hilliard on Torts, 524; *McManus v. Crickett*, 1 East, 106; *Sharrod v. London & N. W. R'y*, 4 Ex. 580; *Roe v. Birkenhead etc. R. R. Co.*, 7 Id. 36; *Wright v. Wilcox*, 19 Wend. 345; 32 Am. Dec. 507.

But the tendency of later jurisprudence is to discard this distinction, and to recognize the liability of the master, not only for the negligence of his servants, but also for their torts, when done within the scope of their employment, or, in the language of the code, "in the exercise of the functions in which they are employed." It matters not that the acts are willful and tortious, nor that they have been committed in disobedience of the express orders of the master; if they have been done in the exercise of the functions of the employment, the master is responsible. "The test of the master's responsibility," says Judge Cooley, "is not the motive of the servant, but whether that which he did was something which his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name": Cooley on Torts, 536.

The great difficulty in applying these principles lies in defining what acts properly fall within the scope of the servant's employment. The evidence in this case establishes that the porters employed in defendant's service are mere menials employed to clean up the car and keep it in order, and to wait upon the passengers, having no police authority whatever, and no connection with the enforcement of the rules of the service except to report violations of them to the conductor. Anything more completely outside of "the functions in which he was employed" than the assault committed on the plaintiff could hardly be conceived. If it had been his duty forcibly to prevent the plaintiff from entering the car, or to put him out at all, and in performing this duty he had used wanton and needless violence, inflicting injury, defendant might have been responsible. But he had no such duty or authority. We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to hire the privilege, and that in addressing the porter he was dealing with him as a

servant of the company. This emphasizes the outrage to which he was subjected, but would be a dangerous ground for holding the employer responsible. A person has a right to enter a bank for the purpose of collecting a check, and to present it to the paying teller for payment; but if on such presentation, the teller should leap over the counter and knock him down, surely such an act would not subject the bank to liability. So one may lawfully enter a store and deal with any clerk with reference to the purchase of goods, but if, on some dispute, the clerk should commit assault and battery upon him, the merchant would not be responsible therefor. Or if one, on lawful business, should knock at the door of any private house, and on asking the servant who answered the call for permission to see the master, the servant should assault and beat him, would the master be responsible?

Clearly, in all such cases, the lawfulness of the party's conduct, and the fact that the injury was received while he was properly dealing with the servant as a servant, would not suffice to bind the master, unless the latter had expressly or impliedly authorized the act, or had been guilty of some fault in knowingly employing so dangerous a servant.

We cannot distinguish this case from the one above indicated.

The evidence exonerates the defendant from any fault in the employment of Wiley as a porter. He had been in their employment for three years, and during all that time had borne a good character for sobriety, amiability, and politeness.

A case quite similar to this is found in our own reports, where the lock-keeper of a canal, whose duties were to keep the locks, to open and close them, and to collect the tolls, assaulted and cruelly beat an oyster-trader, under the pretext that he had not paid his toll, and the canal company was sued for these tortious acts, but this court rejected the demand, saying: "When an agent, losing sight of the object for which he is employed, commits wrong and causes damage, the principal is no more answerable for them than any stranger; as to such wrongs, the agent must be considered as acting of his own will, and not in the course of his employment, or under any implied authority of his principal": *Ware v. Barataria & L. Canal Co.*, 15 La. 169; 35 Am. Dec. 189.

In another case it was said: "The rule seems to be, that when the agent, acting in the capacity bestowed upon him by the corporation and in the discharge of some duty or employ-

ment directed by the employer or incidental to his situation, does an act that causes damage, the corporation is responsible; but when the agent does any act of his own free will, without reference to his functions as a corporate agent, the corporation is not responsible. For example, if a person should go into a banking house or an insurance office and there get into a difficulty or dispute in relation to business of the corporation, with an agent or officer, and an assault and battery should ensue, we suppose it would not be seriously contended that the bank was answerable in damages, unless there was some express recognition of the act": *Etting v. Commercial Bank*, 7 Rob. (La.) 459; *Dyer v. Rieley*, 28 La. Ann. 6; *Pierce on Railroads*, 279; *Field on Corporations*, sec. 524, 623; *Isaacs v. Third Av. R. R. Co.*, 47 N. Y. 122; 7 Am. Rep. 418; *Evansville etc. R. R. Co. v. Baum*, 26 Ind. 72; *New Orleans etc. R. R. Co. v. Harrison*, 48 Miss. 112; 12 Am. Rep. 356; *Flower v. Penn. R. R. Co.*, 69 Pa. St. 210.

Under these views, while we share plaintiff's indignation at the outrage committed on him, we cannot fix the duty of reparation on the innocent defendant, upon whom it is not imposed by the letter or spirit of the law.

2. It is claimed, however, that if not originally responsible, the defendant has ratified the act of the porter by retaining him in its employ after knowledge of his conduct.

It is incredible that the company should have intended to approve or ratify such conduct as that attributed to the porter.

Ratification can only be inferred from acts which evince clearly and unequivocally the intention to ratify, and not from acts which may be readily and satisfactorily explained without involving any such intention: *Breaux v. Sarvoie*, 39 La. Ann. 243, and authorities there cited.

Now, in this case, there were no witnesses to the incident, except the parties thereto. They gave very different accounts of it. The defendant, prompted by its previous knowledge of the porter, believed his story, and did not believe that of plaintiff. It illustrated the sincerity of its conviction by the very fact of retaining the porter, for if, after this incident, the porter had again committed a similar outrage, defendant would undoubtedly have subjected itself to a much more dangerous claim for damages.

If it honestly believed that the porter was innocent of the outrageous conduct charged against him, his retention was,

under such belief, an act of courageous justice, and certainly presents no element of ratification.

Nor is the case affected by the fact that the porter was criminally prosecuted and convicted for assault and battery. His own testimony was not, under the law then in force, admissible in that prosecution. And moreover, he might have been convicted on evidence falling far short of the outrage charged by plaintiff. The porter had been discharged for other causes, before the trial of this suit, and we think the defendant company cannot be charged with ratification of such an outrage, because, in the conflict between the statements of the parties, it believed its own servant, and at all events, thought it just to preserve the *status quo* until the judicial determination of the dispute.

It is therefore ordered, adjudged, and decreed that the verdict of the jury and the judgment appealed from be annulled, avoided, and reversed, and there be now judgment in favor of defendant, and rejecting the demand of plaintiff at his cost in both courts.

SLEEPING-CAR COMPANIES, duties and liabilities of: *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120; 5 Am. Rep. 31, and note 34-36; and see *Pullman Palace Car Co. v. Elhrman*, 65 Miss. 383.

WHETHER SERVANT DID TORTIOUS ACT WITH VIEW to his master's service, or to serve a purpose of his own, is a question of fact for the jury: *Hussey v. Railroad Co.*, 98 N. C. 34; 2 Am. Rep. 312, and see note 317, where the cases bearing on the liability of the master for the tortious act of the servant are collected: *Christian v. Irwin*, 125 Ill. 619.

PITTSBURGH AND SOUTHERN COAL CO. v. BATES.

[40 LOUISIANA ANNUAL, 226.]

GOODS BROUGHT FROM ONE STATE TO ANOTHER BECOME LAWFUL OBJECTS OF TAXATION in the latter state the moment they reach their destination, and are there kept, ready and offered for sale, at any point within the place of destination; and it is immaterial that they remain unloaded on the vessel that brought them, without being consigned to any particular point or to any specially authorized agent.

APPEAL from a judgment dissolving an injunction. The opinion states the case.

W. S. Benedict, Read, Goodale, and H. C. Cage, for the appellant.

M. J. Cunningham, attorney-general, and L. D. Beale, district attorney, for the appellee.

BERMUDEZ, C. J. The plaintiff company appeals from a judgment dissolving an injunction obtained by it, prohibiting the defendant, as *ex officio* state tax collector, from selling a quantity of coal lying in boats at a distance of a few miles from Baton Rouge, in the Mississippi River, to pay taxes alleged to be due the state thereon.

The contention is, that the very law under which the sheriff and tax collector presumes to act exempts the coal from taxation, as property in transit for transportation, and not on consignment for sale: Act 98 of 1886, p. 133.

It is urged at the same time that any tax on the coal which is in transit would violate the constitution of the United States in several particulars, and reference is made to article 1, section 8, clause 3, to same article, section 10, clause 2, and to article 4, section 2, clause 1, and article 1, section 9, clause 5, of that constitution.

Unnecessary pains have been taken to establish the elementary proposition that goods in transit from one state to another cannot be lawful objects of taxation during their passage or transportation in the state, or through the states lying between that of the origin and that of the destination of the goods.

This indisputable doctrine was formally applied by this court in a kindred case: *Brown v. Houston*, 33 La. Ann. 843; and further recognized in the recent case of *Simmons Hardware Co. v. McGuire*, 39 Id. 848.

The defenses urged in the present case, as far as the law governing it is concerned, were offered and considered in the *Brown-Houston* suit, which was carried by writ of error to the United States supreme court.

After an exhaustive examination of the matters involved, that court, in an elaborate, considerate, and well-reasoned opinion, held those defenses untenable, and affirmed the judgment complained of.

The court found and declared that coal mined in Pennsylvania, and sent by water to New Orleans, to be sold in open market there, for account of the owners in Pennsylvania, becomes intermingled on arrival there (New Orleans) with the general property in the state of Louisiana, and is subject to taxation under the general laws of that state, although it may be, after arrival, sold from the vessel on which the transportation was made, and without being landed, and for the

purpose of being taken out of the country on a vessel bound to a foreign port.

In a subsequent case, alluding to this ruling, the same court, through the same learned organ, held that such goods, having arrived at their place of destination, may be taxed in the state to which they are carried, if taxed in the same manner as other goods, and not by reason of their being brought into the state from another state, nor subjected to any unfavorable discrimination: *Coe v. Errol*, 116 U. S. 527.

A review of the constitutional articles invoked, and of the whole jurisprudence on the subject, and mature consideration of the recent rulings just mentioned, force upon the mind the irresistible conclusion that by "goods in transit," protected from all state and municipal taxation, is meant goods moving from one state to another, although delayed in transportation, and that such goods become lawful objects of such taxation the moment they reach their destination, and are there kept ready and offered for sale at any point within the place of destination.

Such, indeed, is the formal announcement of the supreme court of the United States in the *Brown-Houston* case, 114 U. S. 622, in which the following language occurs: "It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other states are to be free from taxation in the state to which they may be carried for use or sale": Page 633.

Looking, now, into the facts of this case, it appears that the coal in question was sent down the Mississippi River to supply the Louisiana trade; that it reached its destination, and was there offered for sale, and sold in part.

The facts, if true, that the coal was and is kept on board the flats which carried it, was not unloaded, and not consigned at this or that point to any specially authorized agent, are immaterial. It is enough that it was in the charge and custody of one or more persons who had the power to sell it, and who have disposed of it in part, and are ready to do so further.

Judgment affirmed.

TAXATION — WHERE PERSONAL PROPERTY MAY BE TAXED: *Mills v. Thornton*, 26 Ill. 300; 79 Am. Dec. 377, and note 378; *Irvin v. New Orleans etc. R. R. Co.*, 94 Ill. 105; 34 Am. Rep. 208. Chattels purchased in one state by the citizen of another, and remaining in the former to be finished, is taxable in the former: *Standard Oil Co. v. Combs*, 96 Ind. 179; 49 Am. Rep. 156.

STATE v. POWELL.

[40 LOUISIANA ANNUAL, 234.]

SURETIES ON OFFICIAL BONDS CANNOT SET UP LACHES OR OMISSIONS OF OTHER OFFICERS of the state as a ground of discharge of their own liability; nor is the ineligibility or disqualification of their principal any defense to an action against them on his bond.

CERTIFIED EXTRACTS FROM BOOKS OF AUDITOR OF PUBLIC ACCOUNTS ARE ADMISSIBLE in evidence in an action on the bond of a defaulting tax collector, and, as public records kept under the requirements of the law, they furnish full *prima facie* proof.

TAX COLLECTOR IS PROPERLY CHARGED WITH SUM TOTAL OF TAX ROLLS AND LICENSES, which he can only offset by legal vouchers for legal payments, and by a delinquent list in due form. He is presumed to have collected all that is on his roll and his number of licenses.

TAX COLLECTOR AND HIS SURETIES CANNOT CLAIM CREDITS NOT ENTERED IN AUDITOR'S ACCOUNT. They are required by law to make their settlements with the auditor, and to see that any offsets to which they are entitled are entered on his books, and if they fail to do so, they must suffer the loss.

PAYMENTS BY TAX COLLECTOR ON ACCOUNT OF PRECEDING YEARS WILL NOT RELEASE HIS SURETIES from liability for moneys collected by him during the term for which they are bound. Such an application of the funds collected by him is as much a misappropriation as if he had used them in the payment of his private debts.

POWER OF ATTORNEY TO BIND CONSTITUENT on "any bond whatsoever" is an express and special authority to bind the constituent on a particular bond. The term "special," as used in the code, does not require a special authority for each particular act.

ACTION on an official bond. The opinion states the case.

C. S. and W. G. Wyly, for the appellant.

F. F. and J. W. Montgomery, J. M. Kennedy, and White and Saunders, for the appellees.

FENNER, J. M. S. Powell was elected as sheriff and *ex officio* tax collector in 1884, and was commissioned and qualified as such on June 16, 1884, for the full term of four years. In June, 1885, he absconded, and was declared a defaulter to the state and parish for a large amount of taxes not accounted for.

The present action is brought against him and the sureties on his official bond. A separate judgment was rendered against his succession, he having died after suit was instituted, for the amount claimed, without prejudice to the rights and defenses of the sureties as to whom the case was subsequently tried, resulting in a judgment in their favor.

The sureties, admitting their signatures to the bond, filed a

general denial as to all other matters, and also certain special defenses.

We will first consider the special defenses, which go to the root of the action, viz.: —

1. They show that Powell had held the same office during several previous years, having been elected as his own successor; that he had been a defaulter to the state in each of said years; that the law of the state required the auditor of public accounts to publish annually the names of all defaulters; that the auditor failed to make such publication; that by reason thereof the fact of his previous defalcations was concealed from them; and that they signed the bond through error in ignorance of this fact, which, if they had known, would have prevented them from signing the same.

2. That under article 171 of the constitution, the said Powell, by reason of his aforesaid defalcation, was ineligible to the office of sheriff, and that, having been elected and commissioned in violation of a constitutional prohibition, the bond is invalid and void.

These defenses are utterly unavailing. It has been so often held that sureties on the bond of an officer cannot avail themselves of laches or omissions of other officers in the performance of duties imposed by law as a ground of discharge of their own liability, and that the ineligibility or disqualification of their principal is no defense, that a mere quotation of the precedents is an all-sufficient disposition of those defenses: *Board v. Judice*, 39 La. Ann. 896; *St. Helena v. Burton*, 35 Id. 521; *Board of School Directors v. Brown*, 33 Id. 383; *State v. Blohm*, 26 Id. 538; *Mayor v. Merritt*, 27 Id. 568; *State v. Breed*, 10 Id. 491; *State v. Dunn*, 11 Id. 549; *State v. Hayes*, 7 Id. 118; *Duncan v. State*, 7 Id. 377; *Mayor v. Blache*, 6 La. 500.

The case last cited learnedly and scientifically disposes of the defense of error, based on concealment or failure to give notice of prior defalcations.

The state's claim is based upon and sustained by certified extracts from the books of the auditor of public accounts. The admissibility and sufficiency of such evidence are disputed by defendants; but it is well settled that they are official records, kept under requirements of law, and as such are admissible and furnish full *prima facie* proof: *State v. Masters*, 26 La. Ann. 268; *State v. McDonnell*, 12 Id. 741.

It is even expressly provided by law that such certified statements shall be held sufficient evidence for the finding of

an indictment against a delinquent tax collector, and "shall be read in evidence against the accused on the trial of the case": Act No. 107 of 1884, sec. 11.

As to the nature and effect of these statements, the court has said: "The process of computing debits and credits on a tax collector's account is very simple. He is charged with the sum total of the rolls and of the licenses, and it is for him to offset these by legal vouchers for legal payments, and by a delinquent list in due form. The tax collector is presumed to have collected all that is on his roll and his number of licenses, and if he does not settle by a given day, he is a defaulter *ipso facto*. Everything is presumed against him. He is *prima facie* liable for the whole amount of the assessment roll, and the *onus* of proof is upon him to show discharge, payment," etc.: *Police Jury v. Brookshier*, 31 La. Ann. 736; *State v. Guilbeau*, 37 Id. 718; *Vermillion v. Comeau*, 10 Id. 695; *Scarborough v. Stevens*, 3 Rob. (La.) 147.

The defendants have failed to furnish any legal vouchers whatever to show any offsets.

They set up that in February, 1885, Powell made large payments to the state treasurer, which they claim were made out of moneys collected from the taxes and licenses of 1884, and they produce the treasurer's receipts. These receipts show a certain amount paid on account of taxes and licenses of 1884, which credits are duly entered and allowed in the auditor's certified accounts herein sued on. The balance of the payments are expressly imputed by the receipts themselves to taxes and dues of previous years. How can defendants contradict the receipts offered in evidence by themselves? and of what avail would such contradiction be? The payments so imputed operated a discharge of the dues to which they are imputed, and how can they have the double effect of discharging others to an equal amount?

This court has expressly held that sureties are not released because the collections covered by their bond have been paid by the sheriff into the treasury on his account for a preceding year.

"The disposition of it, alleged by the defendants," says the court, "was as much a misappropriation as if he had used it in the payment of his private debts": *State v. Hayes*, 7 La. Ann. 121.

The defendants further allege that the blank licenses, with which Powell was charged to the amount of \$5,592.50, were

never used by him, but were turned over by his deputy to his successor in office, — I. C. Bass, — for which sum they claim credit. The only word of evidence in the record with regard to this important allegation is this statement by Bass as a witness: "T. J. Powell was in charge as deputy when I took possession. He turned over to me in blank state licenses for the year 1885, \$5,592."

There is nothing to show that this turning over was ever reported to the auditor; that Bass was ever charged with them; what he did with them, whether he disposed of or accounted for them. If they had been returned to the auditor, or charged to Bass, or otherwise accounted for to the state in any manner, the auditor's books would show it, and that was the source to which defendants should have looked for proof that this valid charge against their principal had been legally accounted for. Not only have they failed to bring such proof, but they have not even produced the blank licenses, which, for aught that appears, may have been used and never accounted for to the state. It was to the state that Powell was bound to account, and he failed to do so. When he absconded, the law provided that "his sureties shall be authorized to take into their hands the list of taxes remaining unpaid, and hold the same until his successor is appointed and qualified, when the sureties shall immediately make a final settlement with the auditor as provided by law": Act 119 of 1882, sec. 83. They have failed to make this settlement, and cannot dispute the indebtedness as charged on the auditor's books upon such utterly insufficient evidence.

The same reasons apply to reject their claims to credits on account of taxes collected and property adjudicated to the state for taxes of 1884, by the successor, Bass. There is no proof that the state received any account of these collections from any source, and it is to the state that the account is due.

If it be true that the state recovers by our judgment more than she is entitled to, she is the fountain of justice, and defendants may find relief by application to the other departments of her government; but we must hold that they have failed to establish these offsets by any competent evidence.

We find in the record an admission that defendants are entitled to credits on the amount claimed in the sums seventy-eight dollars and sixty-five dollars, and shall allow them.

3. One of the sureties, Mrs. Steinhardt, interposes a denial of her liability on the bond, because her name as surety thereon

was signed by an agent without legal authority. The power of attorney under which the agent acted is the broadest and most complete that could be imagined. It seems to have been framed to confer upon the agent, not only every possible general power, but to confer expressly and specially every power for the exercise of which the code requires that the authority shall be express and special. One has only to read it with the articles of the code before him to discover that it was drawn with direct reference thereto, and with the plain intention of conferring upon the agent every possible power, in manner and form as the code provides.

We make the following extract from the powers granted: "To draw, indorse, or accept bills of exchange, promissory notes, or bank checks; to bind the said appearer upon or to any bond, obligation, contract, or agreement whatsoever, either as principal or as surety thereto or thereon; and to sign the same for her and in her name, either as such principal or surety, as the case may be."

Her counsel quotes *Copley v. Flint*, 6 Rob. (La.) 56. In that case the power granted was to make and indorse notes, drafts, etc., and the court held that such a power did not include authority to bind the principal as surety to a contract, saying: "An authority to indorse notes or drafts is different from one to bind the constituent as surety *in solido*." Considering that the power to bind as surety is not mentioned among the acts specially noted in C. C. 2997, but is only included under the general final clause thereof, it seems clear that this mandate was drawn especially to meet the ruling in *Copley v. Flint*, by adding the special power to bind as surety. We have considered all the other authorities quoted, but none of them meet the exigencies of this case.

An express and special power to bind the constituent as surety on "any bond whatsoever" is an express and special authority to bind her on this particular bond. The contention that the term "special," as used in the code, requires a special authority for each particular act, is unreasonable and unsupported by any authority, and would defeat the purposes of mandates; since, if the constituent were required to grant a new authority for each particular act, he might, with less inconvenience, perform the act himself.

If her agent has abused the trust confided in him, she, being *sui juris*, deliberately invested him with the power, and it is

just that she should bear the loss rather than the state, which accepted his action under her express and special mandate.

In framing the decree, we shall follow the precedent in *Teutonia Bank v. Wagner*, 33 La. Ann. 732.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now adjudged and decreed that the state of Louisiana have and recover judgment against the defendants severally, to wit, Fred G. Bernard, William D. Bell, Nathaniel Houghton, Jason Hamilton, Frank D. Rago, Victor M. Purdy, Oliver M. Cherry, Zachariah Goldenburg, Alfred Lewis, John W. Montgomery, and Mrs. Henrietta Steinhardt, in the sum of \$15,818.92, with five per cent per month interest thereon from September 25, 1885, less any amount that may have been collected under the judgment against the succession of M. S. Powell; the said judgment to be operative against said defendants Bernard, Bell, and Houghton up to the sum of one thousand dollars each, and no more; against Hamilton and Rago up to the sum of five hundred dollars each, and no more; against Purdy, Cherry, Goldenburg, and Lewis up to the sum of two thousand dollars each, and no more; against the said Montgomery up to the sum of three thousand dollars, and no more; and against Mrs. Henrietta Steinhardt up to the sum of five thousand dollars, and no more,— with the stipulation that there shall be but one satisfaction of the entire amount due plaintiff, defendants and appellees to pay costs in both courts.

EFFECT OF RECEIPTS, ENTRIES, etc., made by public officers, as evidence against their sureties: *Coleman v. Pike County*, 83 Ala. 326; 3 Am. St. Rep. 746, and note 749, 750.

LIABILITY OF SURETIES ON OFFICIAL BOND for moneys received by their principal in former term: *Morley v. Town of Metamora*, 78 Ill. 394; 20 Am. Rep. 266; *Vivian v. Otis*, 24 Wis. 518; 1 Am. Rep. 199; *Van Sickle v. County of Buffalo*, 13 Neb. 103; 42 Am. Rep. 753.

JOHNSON & Co. v. BOICE. FRELLSEN v. WITKOWSKI.

[40 LOUISIANA ANNUAL, 273.]

HUSBAND CANNOT TESTIFY WHERE HIS WIFE HAS INTEREST involved in the litigation.

SALE OF JUDGMENT IMPLIES WARRANTY OF EXISTENCE OF DEBT evidenced by the judgment, at the time of the transfer, and if the judgment was not then in existence as a claim, the vendor will be bound to restore the price to the purchaser.

NOTICE OF TRANSFER OF JUDGMENT MUST BE GIVEN TO JUDGMENT DEBTOR, unless it be clearly shown that he had knowledge of the transfer, and if he settles with his creditor before notification or knowledge of the transfer, he is discharged from the debt. The mere filing of the transfer among the papers in the suit, and the recording of it in the books of the parish recorder, are not equivalent to the notice required by law.

ACTIONS to revive judgment and to suspend execution. The opinion states the cases.

W. G. Wyly, for the appellant.

J. M. Kennedy, and C. J. and I. S. Boatner, for the appellee.

BERMUDEZ, C. J. The object of the first suit is to revive a judgment, and that of the second is to suspend the execution of that judgment meanwhile. ment has been extinguished.

The ground of resistance by the defendant is that the judgment refusing to revive and perpetuating the injunction, this appeal is taken.

It appears that the judgment sought to be revived was rendered on notes in favor of C. F. Johnson & Co. It is claimed that subsequently it was transferred by that firm in liquidation by one of its members to Mrs. Witkowski, who, it is alleged, was the owner of the notes.

Since the institution of the present proceedings and joining of issue, Mrs. Witkowski has transferred all her rights in and to the judgment to one Herman Wilczinski, who by order of court was substituted to her, and permitted to proceed in the prosecution and defense of the two suits.

Frellsen, one of the defendants in the original suit, and who is the plaintiff in injunction proceeding, contends that the alleged transfer of the judgment by Johnson & Co. to Mrs. Witkowski is null for various reasons, and that even were it valid, it is barren of effect because it was not notified to him. He therefore concludes that the settlement which, in ignorance of that transfer, he avers to have since made with Johnson & Co., has discharged him from the debt.

On the trial, the ostensible plaintiff by substitution, Wilczinski, offered as a witness, Simon Witkowski. Objection was made on the ground of his being the husband of Mrs. Witkowski, the first transferee, who had an interest at stake in the suit.

The objection was answered by saying that as Mrs. Witkowski had ceased to have any interest involved, in consequence of her transfer of her rights in the suit, the opposition was groundless.

The district judge sustained the objection, and refused to allow the witness to be heard. There was no error in the ruling.

Mrs. Witkowski appears to have sold by authentic act to Herman Wilczinski all her rights in and to the judgment, and the two cases for the reviving of the same and for an injunction, above mentioned, and all other suits growing therefrom, etc.

Upon production of this act, an order was obtained, as already said, to substitute Wilczinski to Mrs. Witkowski, after issue had been joined in the two cases.

The sale of these rights by Mrs. Witkowski, though the same be unexpressed in the act, implied a warranty of the existence of the debt, evidenced by the judgment, although it did not include, as a matter of course, that of the solvency of the debtor, for this has to be specially stipulated: R. C. C. 2646, 2647.

It therefore follows that, as she was a warrantor of the existence of the judgment debt sold to Wilczinski, she had an interest at issue, which existence was denied in the suit to revive. It is manifest that if the ground urged by Frellsen is well taken, viz., that the judgment debt had been extinguished, Mrs. Witkowski, as warrantor of that claim, would be liable for reimbursement to her evicted vendee: R. C. C. 2500, sec. 9; *Toler v. Swayze*, 2 La. Ann. 880; *Corcoran v. Ridell*, 7 Id. 268; *Rutherford v. Hennen*, 13 Id. 336.

This would be the case even if she had known or strongly suspected the insolvency of the debtor at the time of the assignment; for then the law provides that the contract would be rescinded, and the assignee compelled to restore the price: R. C. C. 2649.

As Mrs. Witkowski had an interest involved in the litigation, consisting in the recognition and maintenance of the debt, the existence of which she had warranted, it is clear

that her husband could not be permitted to testify, either for or against her: R. C. C. 2281.

The record contains another bill to testimony affecting the genuineness of Mrs. Witkowski's signature to the transfer to her, but the view which we have taken respecting that instrument renders it useless to pass upon that bill.

The next question to be considered is, whether the judgment sought to be revived, and the execution of which is enjoined, was or not extinguished previous to notice or knowledge of the transfer to her.

Frellsen strenuously charges the nullity of the transfer which was apparently made of the judgment by the original plaintiffs to Mrs. Witkowski, and urges in support several grounds, which it is needless to consider.

Admitting that the transfer was truly and legally made, it does not follow that from that fact the settlement which Frellsen claims to have made with those plaintiffs previous to knowledge has not discharged him.

The transfer, in order to invalidate that settlement, ought to have been notified by the original plaintiff, or at least by the subrogee to the judgment debtor.

The law on the subject formally declares that if, previous to the notice having been given of the transfer, either by the transferrer or the transferee, the debtor should have made payment to the former, he will be discharged from the debt: R. C. C. 2644.

In answer to this defense, Mrs. Witkowski retorts that Frellsen had notice of her title to the judgment at the time of the alleged settlement by him with Johnson & Co. (March 9, 1878), because the act of subrogation to the judgment was and had been on file and in the papers of the suit, and also been duly recorded. She alleges no other notice.

Conceding this to be true, it does not follow that the filing and recording are in law equivalent to the notice required by the code, which must consist in something more.

The law does not require any particular form of notice, but it demands that notice be given. The object of the notice is as well for the protection of the transferee as for that of the debtor, in order to prevent an improper payment, thus securing the rights of the transferee to payment, and those of the debtor against loss, and to a legal discharge in case of payment or settlement. It matters not in what manner knowledge of the transfer is brought home to the debtor, provided it

be clearly shown that he knew that his former creditor was divested of his right, and that such knowledge was properly conveyed. The notice or knowledge was indispensable: *Reeves v. Burton*, 6 Mart., N. S., 286; *Styles v. McNeil's Heirs*, 6 Id. 297; *Gillett v. Landis*, 17 La. 471; *Bach v. Twogood*, 18 Id. 414; *Succession of Delassize*, 8 Rob. (La.) 259; *Flint v. Franklin*, 9 Id. 207; *Bank of St. Mary v. Morton*, 12 Id. 409; *Plympton v. Preston*, 4 La. Ann. 356; *Blondin v. Christophe*, 13 Id. 324; *Swan v. Moore*, 14 Id. 833; *Dockham v. City of New Orleans*, 26 Id. 302.

It has consequently been held that the record of an assignment in the office of a parish judge is not notice sufficient to bind third persons: *Thomas v. Callihan's Heirs*, 5 Mart., N. S., 181; and that knowledge in the judgment debtors' attorney of record of the assignment of the judgment is not sufficient notice: *Adams v. Henning*, 9 La. Ann. 225.

The transfer in question to Mrs. Witkowski purports to have been made on December 27, 1876. It is not claimed or shown that it was in any manner notified to Frellsen, or that he had any knowledge of it previous to the institution of the suit to revive. The consequence of the omission is, therefore, under the very terms of the law, that if Frellsen has made any settlement with Johnson & Co., who had obtained against his firm, his partner, and himself *in solido* the judgment in question, before he had any knowledge of the transfer to Mrs. Witkowski, he has satisfied his debt, and that neither Mrs. Witkowski nor her transferee can obtain a revival of the judgment.

Now, the evidence is clear that on March 9, 1878, Frellsen made a settlement with Charles F. Johnson & Co., by which, in consideration of the amount acknowledged to have been paid, he was discharged by them of all claims against him, whether included or not in the account on which the receipt and discharge was signed by P. Prudhomme, the partner who represented with authority the partnership in liquidation in the transaction.

The objection that Frellsen cannot claim a discharge under article 2644, R. C. C., because such is obtained only on payment, and not at all on compromise, has no force.

A creditor, if he choose, can extinguish part of his claim by remission, and accept payment of the debt, as reduced, in full of what it previously was. A part payment discharges, as well as a payment in full, by consent of parties: R. C. C. 2130.

These views relieve us from passing on the title of Mrs. Witkowski to the notes on which the judgment was obtained, and on the question of her obligation to account for the property originally seized when the suit was brought, and which was released on a bond signed by her as surety.

We therefore conclude that, as the judgment sought to be revived and executed was satisfied and extinguished previous to notice and knowledge of the transfer to Mrs. Witkowski, the finding of the lower court must be maintained.

Judgment affirmed.

HUSBAND IS INCOMPETENT WITNESS for wife in a civil suit in which she is a party: *Cramer v. Reford*, 17 N. J. Eq. 367; 90 Am. Dec. 594. And a statute removing the disability of witnesses on the ground of interest does not render the husband and wife competent witnesses, the one for or against the other, even as to matters not confidential: *Gee v. Scott*, 48 Tex. 510; 26 Am. Rep. 331.

WHERE JUDGMENT CREDITOR ASSIGNS JUDGMENT, and the judgment debtor, without notice of the assignment, afterwards pays the amount thereof voluntarily to the sheriff upon being served with garnishee process, the rights of the assignee are not affected, and he may still enforce the judgment: *Brown v. Ayres*, 33 Cal. 525; 91 Am. Dec. 655; and see *Isett v. Lucas*, 17 Iowa, 503; 85 Am. Dec. 573, and note 576, as to the assignee's rights.

STATE EX REL. PATTON v. HOUSTON.

[40 LOUISIANA ANNUAL, 393.]

TO INVOKE JURISDICTION OF SUPREME COURT UNDER CERTIORARI AND PROHIBITION, RELATOR MUST ESTABLISH one of three things: 1. That the proceedings are infected with some fatal irregularity rendering them absolutely void; or 2. That the jurisdiction of the cause did not belong to the court which assumed it, but to a different court; or 3. That the cause is of a nature jurisdiction of which is denied to any court, because not within the limits of judicial power.

MANDAMUS LIES TO COMPEL CONSTITUTIONAL EXECUTIVE OFFICERS TO PERFORM DUTIES required of them by law.

PUBLIC OFFICERS CHARGED WITH SPECIFIC MINISTERIAL DUTIES IN ELECTION MATTERS may be compelled by *mandamus* to perform such duties.

REGISTRAR REQUIRED BY LAW TO APPOINT COMMISSIONERS TEN DAYS BEFORE ELECTION, and to publish them six days before the election, who has violated his legal duty in the selection of such commissioners, may be compelled by *mandamus* to undo or to correct what he has done. The object of the law requiring him to act a certain time before the election is to afford an opportunity to correct any violation of his duty which he may commit.

SUPERVISORY JURISDICTION OF SUPREME COURT IS DISTINCT FROM ITS APPELLATE JURISDICTION, and questions determinable by it in the exercise of the latter only cannot be considered by it in a proceeding invoking the exercise of the former jurisdiction.

CERTIORARI and prohibition. The opinion states the case.

E. D. White, E. H. McCaleb, and W. H. Rogers, for the relator.

FENNER, J. Relator invokes the exercise of our supervisory jurisdiction, by means of the extraordinary writs of prohibition and *certiorari*, to declare the nullity of a certain judgment rendered by the respondent judge, and to prohibit him from further proceeding in execution thereof.

The judgment complained of was rendered in a *mandamus* proceeding brought before the civil district court by Henry C. Warmoth and other Republican candidates for offices of the state which are to be filled at an election to be held on April 17th, wherein they allege that, by virtue of sections 13 and 15 of act No. 58 of 1877, it was made the duty of the registrar of voters for the parish of Orleans to appoint for each voting precinct three commissioners of election, to be assisted by a clerk of election, said commissioners and clerk to be selected from opposing political parties, such appointments to be made ten days before the election, and to be published at least six days before the election; that more than ten days before the election, representatives of the Republican party had requested said registrar to comply with his said duty, by appointing a commissioner or commissioners selected from the Republican party, and had furnished him with names of qualified Republicans from which to make such selections; but that the said registrar had failed to perform the duty imposed upon him by law, and had violated said duty by appointing all the commissioners at said election from members of the Democratic party. On appropriate averments of the absence of all other adequate remedy, they ask for a writ of *mandamus* commanding and compelling him to appoint a commissioner at each precinct selected from the Republican party.

In answer to an order to show cause why the peremptory *mandamus* should not issue, the registrar filed the following defenses: 1. An exception to the jurisdiction of the court; 2. An exception of no cause of action; 3. That in the appointment of commissioners he exercised a discretion legally vested in him by the statute, and not subject to judicial control; 4. That in his said appointments he had actually complied with all requirements of the law.

The case went to trial on these issues, evidence was heard, and the court, in an elaborate opinion, overruled all the de-

fenses, and rendered judgment making the *mandamus* peremptory.

It is to be borne in mind that the proceeding now before us is not an appeal, and vests us with no appellate jurisdiction over the case, under which we may review questions merely affecting the correctness of the judgment.

The application invokes the exercise of our supervisory jurisdiction exclusively, and in considering it, we must be guided and controlled by those rules and limitations which have been formulated and fixed by the laws of the state and the jurisprudence of this court.

To obtain the relief sought herein under the writs of *certiorari* and prohibition, these rules imperatively require that relator shall establish one of three things, viz., either, — 1. That the proceedings are infected with some fatal irregularity rendering them absolutely void, such as want of citation or refusal of a hearing, and the like; or 2. That the jurisdiction of the cause did not belong to the court which assumed it, but to a different court; or 3. That the cause is of a nature jurisdiction of which is denied to any court, because not within the limits of judiciary power.

It is not pretended that either of the two first grounds of relief is presented in this case. The perfect regularity of the proceedings in the court below is not questioned. There is no complaint that the court has assumed a jurisdiction which is vested by law in some other court. On the contrary, it will be admitted that, if any court is vested with jurisdiction over the persons and the subject-matter of the controversy, it is and must be the civil district court.

It follows, therefore, that the whole contention of relator is narrowed down to the proposition that the proceedings concern a subject-matter, the power to consider and determine which lies outside of the functions and powers of the judiciary.

Analyzing as completely as we can the positions of relator, we find this contention to be based on the following grounds, viz.: —

1. That relator is a constitutional officer belonging to the executive department of the government, and not subject to judicial control in the execution of the functions of his office. This is answered by the very language of the code of practice touching the writ of *mandamus*, article 834 of which declares: "It may be directed to public officers to compel them to fulfill any of the duties attached to their office, or which may be

legally required of them." There is no exception of constitutional executive officers, and our reports are full of cases in which such jurisdiction has been exercised over the auditor, the treasurer, the secretary of state, and other executive officers.

2. That as the subject-matter of the case is one touching the conduct of elections, such matter does not lie within judicial cognizance. There is no authority and no reason to support this broad proposition. It is true that it has been held by this court that in the absence of special statutory authorization courts are without jurisdiction, *ratione materiæ*, to entertain cases of contested election: *State v. Judge*, 13 La. Ann. 89.

This is a rule widely recognized and generally prevalent, and resting on peculiar principles; but it has never been extended so far as to exempt officers charged with the conduct of elections, and with the ascertainment and promulgation of the results thereof, from judicial control to require them to perform the specific duties imposed upon them by law.

Thus says Mr. High, under the full sanction of authority: "Notwithstanding the rule denying the relief by *mandamus* to compel admission to a disputed office or to determine the title thereto, there are certain incidents connected with the question of title and election to public offices, which, from their nature, involve the exercise of merely ministerial powers, and are hence properly subject to control by *mandamus*. Among those incidents are the canvassing of election returns, the issuing of certificates of election to the persons entitled thereto, and the issuing of a commission to a claimant duly elected": High on Extraordinary Legal Remedies, sec. 55; *State ex rel. Barbin v. Secretary*, 32 La. Ann. 579.

So says High: "*Mandamus* has also been held to be an appropriate remedy to protect the right of a voter to registration of his name upon the poll list. And a registering officer, appointed under the laws of the state for this purpose, may be compelled by the writ to register the names of voters applying for registration, and properly entitled to vote": High on Extraordinary Legal Remedies, sec. 66.

Of course, in all such cases, the propriety of the writ will depend upon the distinction between duties of a purely ministerial nature involving the exercise of no official discretion, and those which are *quasi* judicial, and involve the exercise of such discretion.

It would, indeed, be monstrous if officers charged by the

legislative will, with specific duties intended for the protection of the electoral right of the citizen and for the security of fair elections, could disregard and violate them with impunity. No authority is or can be cited exempting public officers charged by law with specific ministerial duties in election matters from the same judicial control which is exercised over all other officers of the state with reference to similar duties.

3. It is claimed that the statute required that the appointment of commissioners should be made ten days before the election, and published at least six days before the election; that having so made and published his appointments, his power was exhausted, and courts had no power to compel him to undo or to correct what had been done. We are strongly doubtful whether this ground does not go exclusively to the merits of the case, and is not, therefore, beyond our review in this case. But, at all events, it is entirely without merit.

The right to invoke the aid of courts to compel the performance of this alleged duty could not arise until the relator was actually in default. This is elementary, and is strongly announced by Mr. High, as follows: "*Mandamus* is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duties when the proper time arrives. It is, therefore, incumbent on the relator to show an actual omission on the part of the respondent to perform the required act; and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time": High on Extraordinary Legal Remedies, sec. 12.

Relators in the case below were not in position to exercise their right, until, by the action of the registrar, he placed himself in default by violating his alleged duty. A legal right cannot be paralyzed by such a paradox, which says to the person injured: "You cannot proceed before the registrar acts, because it is too soon; and you cannot proceed after he has acted, because it is too late." On the contrary, we are satisfied that the very object of the law in requiring the registrar to act in a certain period preceding the election was to afford parties an opportunity to correct any violation of his duty which he might commit.

4. The final grounds are, that the law relied on did not impose on the registrar the specific duty, the performance of which was sought to be enforced by *mandamus*, and that the

duty imposed with reference to the appointment of commissioners was of a character involving the exercise of official discretion, and that, having exercised such discretion and discharged his duty in accordance therewith, his action is not subject to judicial control by *mandamus*.

It is obvious that these questions belong exclusively to the merits of the cause. In every *mandamus* proceeding brought against public officers, in the language of the code of practice, "to compel them to fulfill the duties attached to their office, or which may be legally required of them," the questions necessarily arise, Is the duty alleged imposed by the law? Has the officer violated the duty? Is the duty of a character authorizing the court to enforce it by *mandamus*? The solution of these questions constitutes the entire merits of every such proceeding, and the sole judicial function involved therein. The court seised with jurisdiction of such a controversy is necessarily invested with full power to examine and determine these questions of mixed law and fact, the determination of which is a necessary condition precedent to the rendition of any judgment whatever. The claim that error in such determination entails the nullity of the proceeding and judgment has no more foundation than a claim that like error would strike any other judgment with nullity. We are clearly precluded from considering such questions in this proceeding. As we said in a former case, and have often reiterated: "The constitution intended that our supervisory jurisdiction should be distinct, in nature as well as in name, from our appellate jurisdiction. The former was intended simply to enable us to compel inferior courts to perform their functions, to prevent them from exceeding the bounds of their jurisdiction, and to enforce the observance of that regularity in their proceedings which is essential to fairness in the conduct of contradictory litigation. Mere error in the decision of questions properly submitted to their determination, and regularly determined, can only be corrected in the exercise of a jurisdiction purely appellate": *State ex rel. Wintz v. Judge*, 32 La. Ann. 1225.

Finding in this case that the respondent judge had jurisdiction of the cause, that he was vested with judicial power to hear and decide it, and that his proceedings have been in all respects regular, there is no occasion or room for the exercise of our supervisory jurisdiction.

It is therefore ordered that the applications for writs of *certiorari* and prohibition be denied at relator's cost.

OFFICE OF WRIT OF CERTIORARI: *In re Saline County*, 45 Mo. 52; 100 Am. Dec. 337; *In Matter of Lantis*, 9 Mich. 324; 80 Am. Dec. 85; *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444; 9 Am. Rep. 591. Of writ of prohibition: *People v. Wayne Circuit Court*, 11 Mich. 393; 83 Am. Dec. 754. Of writ of mandamus: *Tobey v. Hakes*, 54 Conn. 274; 1 Am. St. Rep. 114, and note 116; *Sansom v. Mercer*, 68 Tex. 488; 2 Am. St. Rep. 505, and note 510; *Wheeler v. Irrigation Co.*, 10 Col. 582; 3 Am. St. Rep. 603, and note 615; *Cassatt v. Board of Commissioners*, 39 Kan. 505; *Huffman v. Mills*, 39 Id. 577; *State v. Roderick*, 23 Neb. 505; *Rigney v. Fischer*, 113 Ind. 313; *State v. Adams*, 19 Nev. 370; *Wulstange v. McCollom*, 83 Ky. 361.

WILLIAMS v. PULLMAN PALACE CAR COMPANY.

[40 LOUISIANA ANNUAL, 417.]

LIABILITY OF RAILROAD COMPANY FOR ACTS OF PORTER OF PALACE CAR COMPANY. — The porter of a Pullman palace car must be regarded as the servant of the railroad company of whose train such car is a part, in all matters pertaining to the safety of passengers whom it undertakes to carry over its line, and the company is liable for injury received by one of its passengers at the hands of such porter, where such passenger was not a trespasser upon the palace car at the time the injury was inflicted.

RAILROAD COMPANY IS LIABLE FOR WANTON AND MALICIOUS ASSAULT ON PASSENGER, made by one of its servants.

PASSENGER ON RAILWAY TRAIN IS NOT TRESPASSER ON PALACE CAR which he enters for the purpose of asking permission to wash his hands.

ACTION to recover damages. The opinion states the case.

Benedict, and Read and Goodale, for the appellant.

Percy Roberts, and Farrar and Kruttschnitt, for the appellees.

POCHE, J. This appeal presents plaintiff's claim for damages against the Louisville, New Orleans, and Texas Railway Company for personal injuries received by him at the hands of the porter of the Pullman Car Company, on the 23d of November, 1885, while he was a passenger of the railway company between Zachary station and Baton Rouge.

His demand was against both companies *in solido*, but on motion separate trials were granted, resulting in a verdict in his favor against the Pullman company, and in the other case in a verdict in favor of the railway company.

On appeal to this court, the judgment in his favor and against the Pullman company was reversed, and his demand rejected. His present appeal is from the judgment below, which rejected his demand against the railway company.

The pleadings and the evidence are the same in both cases, and as they are stated with precision and at length in our

opinion in the first case, they need not be repeated here: See *Williams v. Pullman Palace Car Co.*, ante, p. 512.

It is in proof, and it is not disputed, that plaintiff had paid his fare as a passenger on the defendant's train, and that he was, as such, entitled to all the privileges and to the protection which a common carrier or transporter owes to its passengers.

Defendant's main contention is, that plaintiff was a trespasser in the Pullman car, and that he thereby forfeited his right to protection from the railway company, according to the terms of his contract of transportation.

Under our understanding of the issues presented by the pleadings, plaintiff's right of recovery against the railway company hinges upon the proper construction of the two following questions: 1. Can the railway company be held liable for the acts of an employee of the Pullman Car Company under any circumstances? 2. Was plaintiff a trespasser on the Pullman car when he was struck by the porter? or was he there entitled to the full protection of the railway company as one of its passengers?

1. An extended review of decisions of American courts has brought to our attention several adjudications which hold the affirmative of the first question which we are called to discuss in this case.

In one of those decisions the following principle is announced: "Passengers upon a railroad, taking a drawing-room car, have a right to assume that they are there under a contract with the railroad corporation, and that the servants in charge of the car are its servants, for whose acts, in the discharge of their duty, it is liable": *Thorpe v. New York etc. R. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325.

The substantial facts of that case were: That a passenger on one of the defendant's trains, finding all the seats occupied in the ordinary or day coaches, walked into a drawing-room car attached to and forming part of the train, and took a seat therein. When called upon by the porter to pay the extra charge for a seat in that car, he refused to pay the sum demanded, for the reason that he could find no seat elsewhere; whereupon the porter attempted to eject him from the car, and for this assault he brought a suit for damages. On appeal from a judgment in his favor, and against the railway company, the court of appeals of New York recognized his cause of action, and enforced the liability of the railway company

for the acts of the porter or employee of the drawing-room car company. Among other things, the court said: "The general principle is well settled, that to make one person responsible for the negligent or tortious act of another, the relation of principal and agent, or master and servant, must be shown to have existed at the time, and in respect to the transaction between the wrong-doer and the person sought to be charged. The defendant relies upon the absence of this relation between the porter and the company as conclusive against its liability for his acts. But we are of opinion that this defense is not available to the defendant, or rather that the persons in charge of the drawing-room car are to be regarded and treated, in respect of their dealings with passengers, as the servants of the defendant, and that the defendant is responsible for their acts to the same extent as if they were directly employed by the company."

Sanctioning the same rule, the supreme court of the United States enforced the liability of a railway company for damages received by one of its passengers while he occupied a seat in a Pullman company car attached to the defendant's train. The accident had been caused by the falling on the head of the passenger of the upper berth of the sleeping-car, and was due to the unsafe condition of the brace or arm which supported the upper berth, and which was afterwards found to be broken: *Pennsylvania Company v. Roy*, 102 U. S. 451.

In dealing with the question which now concerns us, the court said: —

"The undertaking of the railroad company was to carry the defendant in error over its line in consideration of a certain sum, if he elected to ride in what is known as a first-class passenger-car; with the privilege, nevertheless, expressly given in its published notices, of riding in a sleeping-car, *constituting a part of the carrier's train*, for an additional sum paid to the company owning such car.

"As between the parties now before us, it is not material that the sleeping-car in question was owned by the Pullman Palace Car Company, or that such company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passenger over its line. In performing that duty, it could not, consistently with the law and the obligation arising out of the nature of its business, use cars or vehicles whose inadequacy

or insufficiency for safe conveyance was discoverable upon the most careful and thorough examination. . . . For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and *porter, were in law the servants and employees of the railroad company.* [Italics are ours.] Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company."

In a case predicated on similar facts, the supreme court of Ohio applied the same rule: *R. R. Co. v. Walrath*, 38 Ohio St. 461.

Commenting on the preceding and other adjudications, Wood, in his work on railway law, has formulated the rule as follows: "The practice of running trains controlled by two separate and distinct corporations has become quite common in this country, and as a result, questions as to the relative liability of these corporations will be likely often to arise."

It has been held in several cases that when a passenger has purchased a ticket of a parlor-car company, entitling him to ride in its car, and also a passage ticket of the railway company, the railway company is to be regarded as liable for the negligence of the palace car company; and that its servants are to be treated as the servants of the railway company in everything that regards the safety and security of the passenger: Wood's Railway Law, p. 1442, sec. 366.

Believing that in a question of such vast importance, on matters of litigation likely to arise in all parts of the American Union, this court should seek to place its rulings and jurisprudence in line and in harmony with those of the supreme court of the United States, and of the courts of last resort of our sister states, wherever those decisions do not militate against the principles of our special and exceptional system of laws, we deem it our duty, without hesitation, to adopt the conclusions which so clearly flow from the highly respectable authorities to which we have just referred, and from which we have thought it proper and useful to make the foregoing copious quotations.

Applied to this case, in which it appears that the Pullman car was attached to defendant's train, under the same circumstances, rules, and regulations, and for the same purposes as

shown in the cases hereinabove mentioned, the rule of law thus sanctioned leads to the legal conclusion that for the purposes of this contention the porter of the sleeping-car, by whom Williams was stricken down and injured, must be treated as being at the time a servant or employee of the defendant company, and as such intrusted with the duty of contributing, in the performance of his legitimate duties, to the safety and security of the passenger which the railway company had undertaken to carry safely over its line.

Hence it follows that the railway company must be held liable for injuries sustained by one of its passengers through the negligence or fault or other acts of the porter in question. And under well-established jurisprudence, it is equally clear and logical that such liability extends to and embraces injuries inflicted on the passenger by means of a willful and malicious assault by a railroad employee on the passenger.

That responsibility is the subject of a very able and masterly discussion by the supreme judicial court of Maine, in the case of *Goddard v. Grand Trunk R'y Co.*, 57 Me. 202, 2 Am. Rep. 39, in which a passenger was allowed exemplary as well as compensatory damages for gross insults heaped upon him by a brakeman on the train on which he was then traveling. In that opinion, from which we made copious extracts in our previous decision (*ante*, p. 512), the court enforced the rule that "a common carrier of passengers is responsible for the willful misconduct of his servant toward a passenger."

"A passenger who is assaulted and grossly insulted in a railway car by a brakeman employed on the train has a remedy therefor against the company."

In *Pennsylvania R. R. Co. v. Vandiver*, 42 Pa. St. 365, 82 Am. Dec. 520, the railway company was held liable for injuries inflicted on a passenger by a violent ejection from the train.

A like responsibility was decreed against the railroad company for injuries sustained by a lady passenger in a general fight between drunken passengers in the coach in which she occupied a seat, on the ground that the conductor had not used the proper means to quell the disturbance: *Pittsburg etc. R. R. Co. v. Hinds*, 53 Pa. St. 512.

Our own jurisprudence has sustained an action by a lady passenger against the owners of a vessel for insulting and abusive language used to her and about her by an employee of the common carrier. The principle is thus summarized in

that opinion: "The master of a vessel is liable for the indecent and inhuman conduct of himself and of his crew excited by him towards a passenger."

"Owners of vessels carrying passengers for money are subject to the same responsibility for a breach of duty by their officers to the passengers as they would be in regard to merchandise committed to their care": *Keene v. Lizardi*, 5 La. 431; 25 Am. Dec. 197.

We therefore conclude that the case is with plaintiff, unless it should appear that he was a trespasser on the Pullman car when the incident occurred resulting in his injuries.

2. And this brings us to the consideration of the second question involved in the controversy. Under the result of our examination of the evidence as announced in our previous opinion, this question offers no difficulty in the present case.

We said on that subject: "We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to have the privilege, and that in addressing the porter he was dealing with him as a servant of the company."

A second examination of the record has had the effect of confirming the correctness of that conclusion.

The preponderance of the evidence on that point, although very conflicting, shows to our entire satisfaction that plaintiff did ask permission of the porter to wash his hands, and that after an exchange of a few unpleasant words, the porter struck him on the head with a blunt instrument while plaintiff was standing at the threshold of the door of the Pullman car. He was stunned by the blow, which felled him to the platform, whence he was picked up and brought to the forward car by one of his friends. His testimony as to the main features of the incident is corroborated by that of two other witnesses, although no witness saw the whole incident.

Hence we conclude that the attack was unprovoked, unjustifiable, and willful on the part of the porter, for whose conduct the defendant company must be held liable in damages.

As the Pullman Car Company, the immediate and direct employer or master of the wrong-doer, has been shielded from responsibility by our previous decree, the case may be a hard one on the defendant; but under the authorities by which we have been guided, the hardship appears inevitable. Our ruling in that case rested on the pivotal feature that there existed no contractual relations between plaintiff and the

company. Our conclusions find ample support in the decision of the case in 76 New York, hereinabove referred to, in which the railway company was made to respond for the ejectment of a passenger from the drawing-room car, in which he claimed the right of occupying a seat without paying therefor.

On this point, we quote from the opinion of the supreme court of the United States in Roy's case, 102 U. S. 458, the following utterances: "Whether the Pullman Car Company is not also and equally liable to the defendant in error, or whether it may not be liable over to the railroad company for any damages which the latter may be required to pay on account of the injury complained of, are questions which need not be here considered. That corporation was dismissed from the case, and it is not necessary or proper that we should now determine any question between it and others."

Under all the circumstances of the case, we hold that plaintiff is entitled to recover damages in the sum of one thousand dollars.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, reversed, and the verdict of the jury set aside; and it is now ordered that plaintiff do have and recover judgment of the defendant, the Louisville, New Orleans, and Texas Railway Company, in the sum of one thousand dollars, and for costs in both courts.

SLEEPING-CAR COMPANIES: See *Williams v. Pullman Palace Car Co.*, ante p. 512, and note 519.

NEW ORLEANS GAS LIGHT COMPANY v. HART.

[40 LOUISIANA ANNUAL, 474.]

GAS COMPANY HAS NO RIGHT TO INDEFINITELY KEEP LAMP-POSTS ON CORNER OF STREETS of a city after its contract to supply the city with gas has expired, and it has ceased to supply any gas thereto. A charter from the state to such company granting it the right to lay gas mains about the streets of the city does not confer upon it authority to put up and keep lamp-posts upon the public streets or corners, when the community is not actually benefited thereby.

ONLY THOSE ASSERTING SIMILAR CONFLICTING RIGHT CAN CONTROVERT a right granted by a city to other persons to erect towers or supports to carry wires for electric purposes, and to remove obstructions to such erections.

CITY OF NEW ORLEANS HAS RIGHT, IN EXERCISE OF ITS POLICE POWER, TO REMOVE OBSTRUCTIONS to the erection of towers for electric lights, for the public benefit and convenience, and may delegate that power.

POLICE POWER IS RIGHT OF STATE OR OF STATE FUNCTIONARY TO PRESCRIBE REGULATIONS for the good order, peace, protection, comfort, and convenience of the community, which do not encroach on the like power vested in Congress by the federal constitution.

SUIT for injunction. The opinion states the case.

Braughn, Buck, Dinkelspiel, and Hart, for the appellant.

Farrar, Jonas, and Kruttschnitt, Blanc and Butler, and W. H. Rogers, for the appellee.

BERMUDEZ, C. J. The object of this suit is to enjoin perpetually the defendant from removing the lamp-posts erected by the plaintiff company in this city.

In defense, it is alleged that plaintiff has no right to oppose the removal when the same is unnecessary, and that the defendant has the right to take down the posts, under the authority delegated to him by the city in the exercise of the police power.

From a judgment dissolving the injunction issued *in limine* and rejecting the demand, with recognition of the right to remove claimed by the defendant, the plaintiff prosecutes this appeal.

The contention in this controversy arises under section 5 of ordinance No. 2145, C. S., adopted on March 8, 1887, by the city council of New Orleans, providing for the erection and construction, upon the streets, of a system of towers, or supports, for the purpose of carrying all wires and cables, whether for telephone, electric light, telegraph, or other electrical objects, and authorizing the defendant to put up such towers, and to remove obstacles to such erection.

The ordinance provides that, whenever in the course of construction or erection of any of said towers, or supports, it shall be found necessary to remove or displace any post, pole, awning, sign, support, or other thing in or upon the public places, banquettes, or streets, the said grantee, his heirs, agents, assigns, and successors, shall have the right to remove said post, pole, awning, sign, support, or thing or things, and to occupy the place or places from which said removal shall have been made.

There is no dispute about the facts. The plaintiff company has erected numerous lamp-posts at the corners of the sidewalks in the city, for the purpose of vending gas light to it, and illuminating the streets and thoroughfares. The con-

tracts for thus supplying this commodity have expired, and others have been entered into for electric illumination.

Testimony establishes the danger to life and limb, in cases of fire, from contact with electric wires with the apparatus of the fire department, both when they approach buildings and when they fall upon the ground. It also shows the infinite number of electric wires strung on posts about the streets of the city for different objects,—a fact so notorious that it may be judiciously noticed.

The plaintiff shows no contract with the city to put up and keep indefinitely the lamp-posts which it has erected for the purpose of supplying light to the city, when none is furnished, for the use of the public. It alleges its charter from the state, granting it the right to lay gas mains about the streets, but it avers no authority from the state to put up and keep lamp-posts upon the public streets or corners when the community is not actually benefited thereby.

It is a fact that the defendant claims the right, and was about to exercise it, of removing such lamp-posts erected by the plaintiff company, found at spots at which towers are proposed to be elevated.

We understand the company to contend that the defendant has no such right, because it has a contract whereby it is entitled to put up and keep the posts; because the right claimed by the defendant would arise from a prohibited monopoly; because the city herself could not remove the posts and even then delegate the power.

1. It is apparent, from the charter of the company, the right to erect and keep lamp-posts on the corners of sidewalks in New Orleans was in no way granted it by the legislature, although that of laying mains on the streets themselves was formally conferred; but the privilege of laying such mains does not imply, unless *ex necessitate*, that of erecting posts at those corners on the sidewalks. The mains are designed to supply gas to all consumers, whether the city, to corporations, or to individuals, and may be and are used for those purposes; but it naturally occurs that when the city ceases to be a consumer, the right of the company ceases to have lamp-posts on its sidewalks.

Hence it cannot be claimed that the plaintiff has any absolute contract right to preserve its lamp-posts at those particular spots, and that the action of the municipal authorities has impaired that right, although we do not propose to say

that even the city, in the exercise of her police powers, could not, in a proper case, have done by herself what she has authorized another to do.

2. The plaintiff contends further that the rights granted by the city to the defendant amount to a monopoly, which comes within the ban of article 48 of the state constitution. To this it is sufficient to answer that is a principle well founded that no one can be heard to complain of and charge the unconstitutionality of the grant of an exclusive right or privilege who does not assert a similar conflicting right. This rests upon the plain and common-sense reason that it must be to such person a matter of utter significance who exercises that right or privilege, whether he be one that does so exclusively or not. If it be true that the city has the right to operate the removal, what is it to the plaintiff that the city do it by her immediate servants, or causes it to be done by some specially designated person, as in the instant case?

3. The last objection to be considered is, whether the city could have exercised the right of removal of the obnoxious lamp-posts. That right the city possesses as an inherent concomitant of the police power. So far, that power has not received a full and complete definition; but it may be said to be the right of a state, or of a state functionary, to prescribe regulations for the good order, peace, protection, comfort, and convenience of the community, which do not encroach on the like power vested in Congress by the federal constitution.

Of that power it may well be said that it is known when and where it begins; but not when and where it terminates. It is a power in the exercise of which a man's property may be taken from him, where his liberty may be shackled, and his person exposed to destruction, in cases of great public emergencies: See 1 Dillon on Municipal Corporations, 3d ed., 166, 167, and *Bass v. State*, 34 La. Ann. 494, where numerous authorities are quoted.

In a kindred case the United States supreme court said: "The supreme court of Indiana placed its decision in support of the statute principally upon the ground that it was the exercise of the police power of the state. Undoubtedly, under the reserved powers of the state, which are designated under that somewhat ambiguous term of "police powers," regulations may be prescribed by states for the good order, peace, and protection of the community. The subjects upon which the state may act are almost infinite, yet, in its regulations with

respect to all of them, there is this necessary limitation that the state does not encroach upon the free exercise of the power vested in Congress by the constitution. Within that limitation, it may, undoubtedly, make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction, which the comfort and convenience of the community may require": *Western Union Tel. Co. v. Pendleton*, 122 U. S. 359.

A similar question having been presented to the United States circuit court in Chicago, Illinois, the learned court held that it is entirely competent for the city authorities, unless they are bound by some absolute contract permitting the poles and wires to stand as they are, to have them removed, and put an end to such unsightly obstructions as the poles and wire are in the streets. There must be a power somewhere to cause them to be removed, and to regulate and control the manner in which telegraph lines shall enter or pass through the city: *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309.

The city of New Orleans has the undoubted right which a citizen would have, and has, who would have agreed with the gas company to illuminate his house for a stated time, and to furnish therefor the necessary appliances. Clearly, at the expiration of the contract, the citizen could require the removal of the appliances, not only because of their appearance, their proving an obstruction to the enjoyment of his property, but also, and particularly, if they were dangerous, some way or other. *Quia placet*, in the end, would be a sufficient reason for the removal.

Now, in the present case, it is clear that the city has the transmissible right to require the removal, not only because the lamp-posts are no longer needed and used for public service, but also because the city needs the very spots on which they happen to have been erected, and it is proposed to utilize those places for other useful and beneficial purposes, and has the exclusive right, under her charter, to regulate the use of the streets and thoroughfares within her limits.

• It is unnecessary to enumerate the benefits expected to be derived from the towers mentioned in the ordinance, the legality of which is maintained, as they are no important factors in the case.

Judgment affirmed.

MUNICIPAL CORPORATIONS, POLICE POWERS OF: *City of St. Paul v. Colter*, 12 Minn. 41; 90 Am. Dec. 278; *State v. Paterson*, 45 N. J. L. 310; 46 Am. Rep. 772; *Ex parte Bourgeois*, 60 Miss. 663; 45 Am. Rep. 420; *Matter of Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310, and note 319. City council, in the discharge of its duties, must act within the bounds described by its charter, and if it exceeds the powers conferred by the charter, its acts will be nugatory: *Agnew v. Brall*, 124 Ill. 312.

LINMAN v. RIGGINS.

[40 LOUISIANA ANNUAL, 761.]

ADMINISTRATOR OF ESTATE NOT PERMITTED TO IMPEACH HIS OWN OFFICIAL ACTS. — A party who, as administrator of an estate, procures an order of sale of real estate under which the property is sold, and who inaugurates and consummates all the proceedings in the cause, cannot be permitted, in an action to nullify such sale, to impeach by his testimony his own official acts or the probate proceedings in such cause.

ADMINISTRATOR, WHO IS SURVIVING PARTNER IN COMMUNITY OF DECEASED, MAY PURCHASE at the sale of the effects of the deceased whose estate he represents.

PROBATE SALE OF REAL ESTATE FOR PAYMENT OF DEBTS IS NOT VOID merely because such debts were not actually due. Such matter is a mere irregularity.

PURCHASER AT PROBATE SALE IS NOT BOUND TO LOOK BEYOND DECREE recognizing its necessity, where such sale is made under the order of the probate court, for the payment of the debts of the deceased.

PRESCRIPTION OF FIVE YEARS CURES ALL INFORMALITIES IN PUBLIC SALE made at public auction, and this bar is perfect and complete in respect to minors, married women, or interdicted persons.

JUDGMENT OF NONSUIT IS NOT PROPER where the defendant makes out a clear and satisfactory defense entitling him to a final judgment. He is entitled to a judgment on the merits, which will preclude any further assertion of the same claims against him.

ACTION to revoke probate sale. The opinion states the case.

J. L. Hargrove, for the appellants.

Alexander and Blanchard, for the appellee.

WATKINS, J. Plaintiffs, as the heirs of Catherine Linman, deceased wife of Herman Linman, seek the revocation and dissolution of an alleged probate sale of real estate, which was, at the time of her death, an asset of the legal community; and they claim one half interest therein.

They substantially allege that, notwithstanding Herman Linman administered the succession of the deceased, an administration was wholly unnecessary, inasmuch as it owed no debts that could not have been satisfied out of the assets of the community other than the real estate, for the sale of which there was no necessity.

The petition states that Linman was regularly appointed, qualified, and confirmed administrator, caused an inventory to be made, filed a tableau of debts, procured an order for the sale of the real estate to pay debts of the succession, and caused a perfectly formal sale to be made, for the stated sum of about thirteen thousand dollars cash.

That on the same day the ostensible purchaser transferred same property to Linman in his individual capacity, for \$13,643. part cash, and the remainder on terms of credit, with security of mortgage and vendor's lien.

That the price of the probate sale was never paid, and the conveyance thereat to Harper, and from Harper to Linman, were simultaneous, and intended to enable the latter to acquire an apparant title to the property indirectly which he could not acquire directly, and that same are null and void.

That, in the foreclosure of his mortgage, Harper became the adjudicatee at sheriff's sale, and at his death the property passed to his legal representative, and that the conveyance was void because the note Harper held was without consideration.

The defendant pleaded, as an exception, the want of a previous tender of the amount of purchase price at the probate sale, and which went to discharge the debts of the deceased. With full reservation he answered and averred that Harper's title is one acquired in good faith, under the probate proceedings above recited, under the order of a competent court to pay succession debts, and that the purchaser paid the price, and conveyed the property to Linman. He further avers that all of said proceedings were valid and legal and in good faith, and thereupon he pleads the prescription of one, three, and five years in bar of this action.

On the trial the court *a qua* dismissed the plaintiffs' action as of nonsuit, and they have appealed. In this court the defendant answers the appeal, and prays for a final judgment rejecting plaintiffs' demands *in toto*.

1. The plaintiffs introduced as their witness the Linman, who was the administrator and obtained the order of sale under which the property was sold, and who inaugurated and consummated all of the proceedings above described, and by whom to substantiate the various allegations of their petition. To the introduction of this witness by whom to prove these facts, the defendant objected on various grounds, and among them are the following, viz.: 1. That Linman could not be

heard to stultify himself, and impeach his own official acts as administrator, nor contradict the judicial allegations and judicial proceedings in the succession he administered; 2. That he would not be heard to contradict his own statement under oath, attesting the correctness and existence of the debts placed by him upon the tableau filed in said succession; and, subsequently, the correctness of the final account, and the genuineness of the debts which purported to have been paid; or to state that same are not just and due by the succession; or that he had not, as administrator, paid the same; 3. That he could not be heard to impeach or contradict his receipt as administrator, in which he acknowledged the payment of the purchase price from Harper.

For the reasons assigned, the testimony of the witness Linman was disallowed, and it has been brought up annexed to a bill of exceptions.

It appears from the succession record that was offered in evidence by the plaintiffs' attorney, that all the grounds of objection are well taken, and particularly the one to the effect that he had sworn, in open court, on the trial of the tableau and account, that the debts enumerated were due by the succession, and that same had been paid by him out of the proceeds of the succession sale.

It is absurd to suppose that any court of justice would listen to the statements of any witness in support of such propositions, which would, of necessity, involve the witness's perjury and turpitude; and although there is an abundance of it, we deem it unnecessary to cite authority in support of our opinion. There is no doubt of the correctness of the lower judge's ruling.

2. The only pertinent evidence in the record on the main issue is that of one of Linman's attorneys.

He states his recollection to be, that the whole of the purchase price was not paid in cash by Harper, and that Harper was a creditor of the succession, and desired a title in himself, and intended to convey it to Linman, and give him time to redeem, or pay the debt due him.

This testimony clearly demonstrates that these titles were not fraudulent simulations, but real and actual sales that were translativ of the property, though it may have been for an inadequate price: *Pochelu v. Catonet*, 40 La. Ann. 327.

3. Simple reference to the code will suffice to show that there was no legal impediment to a purchase by Linman at

the probate sale of the effects of the succession of his deceased wife, and late partner in community. It provides that "any executor, administrator, . . . may purchase at the sale of the effects of the deceased, whose estate he may represent, when he is the surviving partner in community," etc.: R. C. C. 1146.

There was no occasion for Harper to have accepted title as a person interposed for Linman. This pretention is groundless.

4. Conceding for the argument that the evidence shows, or would show, that only a small portion of the alleged succession debts were actually and really due, and it would in no manner affect the question at issue.

In *Webb v. Keller*, 39 La. Ann. 55, we discussed and decided this question, and used the following language, viz.: "The complaint made of the order of court directing the sale, on the ground that the estate of Dr. Webb owed no debts, or if it did, none that had been recognized and proved before a family meeting, or the court, does not go to the court's want of jurisdiction. The debts were subsequently placed upon the tableau, and proved to the satisfaction of the judge who was competent, and same was homologated, and he directed the proceeds of sale to be applied to their payment. This was a mere irregularity, and not a cause to challenge the proceeding as null and void."

That suit was similar in many respects to this, and had a like object of attainment, and the quoted ruling is applicable.

5. In that case we further said that it is the well-settled jurisprudence of this court that the purchaser at a sale made under an order of the probate court, which is a judicial one, is not bound to look beyond the decree recognizing its necessity.

"He must look to the jurisdiction of the court, but the truth of the record concerning matters within its jurisdiction cannot be disputed": *Graham's Heirs v. Gibson*, 14 La. 146; *Ball's Administratrix v. Ball*, 15 Id. 182; *Rhodes v. Union Bank of Louisiana*, 7 Rob. (La.) 66; *Corcoran v. Riddell*, 7 La. Ann. 268; *Shaffet v. Jackson*, 14 Id. 154; *Succession of Gurney*, 14 Id. 622; *Webb v. Keller*, 26 Id. 596; *Frazer v. Zylicz*, 29 Id. 536; *Heirs of Herman v. Janners*, 31 Id. 280. "The purchaser at a judicial sale of property of a succession is not bound to look further back than the order of the court directing the sale": *Succession of Hebrard*, 18 La. Ann. 485; *Woods v. Lee*, 21 Id. 505; *Beale v. Walden*, 11 Rob. (La.) 72; *Brosnahan v. Turner*,

16 La. 440; *Heirs of Nessim v. Weis*, 34 La. Ann. 1004; *Webb v. Keller*, 39 Id. 55.

Defendant has stated his case strictly within this rule. All the motuary proceedings, and those leading up to and embracing the probate and judicial sales in question, are perfectly regular, and the probate sale was made under the authority of an order of the court to pay the debts of the succession.

6. The prescription of five years which the defendant pleads, under R. C. C. 3543, cures "all informalities connected with or growing out of any public sale made . . . at public auction," and this bar is perfect and complete in respect to "minors, married women, or interdicted persons."

The preceding argument and citation of authority prove that the matters complained of are, in truth and reality, only matters of irregularity, and do not involve an absolute nullity or illegality. They are all cut off by the defendant's plea of five years' prescription.

7. The learned judge of the district court dismissed the plaintiff's action as of nonsuit. It appears clear to our minds that this was not just to the defendant, who has made out her defense most clearly and satisfactorily, and is entitled to final judgment, and the judgment of the court *a qua* must be amended.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended; and it is further ordered and decreed that the demands of the plaintiffs be rejected and disallowed, and that, as thus amended, the judgment be affirmed, and at defendant's costs in both courts.

DECLARATIONS OF ADMINISTRATOR IN CHIEF THAT SALE OF INTESTATE'S PROPERTY, MADE BY HIM, WAS PRIVATE, and therefore void, are not competent evidence for the succeeding administrator, for the purpose of impeaching the sale and recovering the property from one claiming under the purchaser at such sale: *McArthur v. Carric*, 32 Ala. 75; 70 Am. Dec. 529.

PROBATE COURTS ARE COURTS OF GENERAL JURISDICTION, and all presumptions are in favor of the validity of their proceedings: *Alexander v. Maverick*, 18 Tex. 179; 67 Am. Dec. 693; see *Withers v. Patterson*, 27 Tex. 491; 86 Am. Dec. 643.

PURCHASE BY EXECUTOR OR ADMINISTRATOR AT HIS OWN SALE IS NOT VOID, but voidable at the election of those interested: *Smith v. Granberry*, 39 Ga. 381; 99 Am. Dec. 464; *Houston v. Bryan*, 78 Ga. 181; 6 Am. St. Rep. 252.

PURCHASER AT SHERIFF'S SALE, AS WELL AS PARTY REDEEMING, IS BOUND at his peril to inquire whether it sufficiently appears on the face of the record that the court had jurisdiction: *Union Iron Works v. Bassick Mining Co.*, 10 Col. 24.

GUNTHER v. NEW ORLEANS COTTON EXCHANGE MUTUAL AID ASSOCIATION.

[40 LOUISIANA ANNUAL, 776.]

EQUITABLE ESTOPPEL — CORPORATION NOT EXEMPT FROM APPLICATION OF PRINCIPLES OF. — A mutual benefit association, whose charter provides that a particular method of giving notice of assessments falling due shall be a proper notification to all members, is not exempt from the application of the principles of equitable estoppel, which operate upon all other persons, natural or juridical.

DOCTRINE OF ESTOPPEL — WHEN MAY BE INVOKED IN MATTERS AFFECTING EXECUTION OF CONTRACTS. — Where a party to a contract has complied with its terms, he has no occasion to invoke the doctrine of estoppel; it is only when the terms have admittedly not been complied with that the question arises whether the other party has, by his representations or conduct, estopped himself from setting up such non-compliance as a ground of forfeiture.

FORFEITURES ARE NOT FAVORED IN LAW; and if a mutual benefit association, although its charter provides only for giving notice of assessments due by posting thereof, adopts and continues for a long time the practice of sending written notices by mail to a certain class of members, a member of that class is justified in believing that such written notice will be sent to him, and in acting upon such belief; and if his failure to pay an assessment is solely due to want of such notice, and he offers to pay the same as soon as he obtains information thereof, the association will be estopped from claiming the forfeiture of his membership, and denying his right to recover because of such supposed forfeiture.

ACTION to recover insurance. The opinion states the case.

Bayne, Denegre, and Bayne, for the appellants.

W. F. and D. C. Mellen, for the appellees.

FENNER, J. The defendant is a corporation, organized as a mutual benefit association, the members of which, or their designated beneficiaries, are entitled, at death, to receive an amount equivalent to the sum of certain assessments which are levied upon and payable by the surviving members.

Plaintiffs exhibit a certificate of the association, reciting the membership of Julius Aroni, and that, "in consideration of twenty dollars by him paid as such, said Aroni has secured to his children [the plaintiffs], in the nature of insurance upon his life, all the benefits of said association, subject at the same time to the conditions, limitations, and penalties imposed by the charter of the association."

Defendant admits the original membership of Aroni, and the right of plaintiffs to claim whatever is due under the certificate, but avers that, in accordance with the provisions of

the charter, he had, prior to his death, been duly suspended for non-payment of assessments, and had entirely forfeited his membership, and all claims against the association.

The charter contains the following provision: "Upon proof of the death of a member, each surviving member shall, within ten days, pay to the secretary the sum of ten dollars. A notice posted in the rooms of the Cotton Exchange shall be deemed a proper notification to all members. Any member not having paid within ten days shall be suspended, and shall be treated as not being on the rolls of membership, and in case of his death during the period of such suspension, he shall forfeit all claims upon the association; provided, however, that within thirty days from date of such notice, upon payment of any past dues, and any that would have accumulated had he remained a member of this association, his suspension shall cease. Should any member remain in default after the expiration of the said term of thirty days, he can only be reinstated by a vote of the board of directors, and upon payment of all arrears."

To become a member, it was essential that the applicant should be either a member of the Cotton Exchange, or the holder of a power of attorney of a member, or a visiting member, or an employee of said exchange; but the charter provided that "any member may withdraw from the Cotton Exchange without severing his connection with this association."

The rule with regard to notice was evidently adopted with reference to the original conditions of membership, under which every member having access to the floor of the Cotton Exchange would have the opportunity to observe the posted notices.

But as time went on, under the operation of the provision last quoted, there arose a class of members of the association who had ceased to be members of the exchange, and had lost the privilege of access to its rooms. As to them, the posting of notices in a room which they were forbidden to enter became obviously unavailing. We do not say that this change of condition operated the creation of any new right, or imposed any duty upon the association to give a different notice from that required by the charter. It might have stood upon its rights, and have held the excluded members to the hard lines of their contract. But it did not choose to do so. On the contrary, it adopted the just and reasonable custom of send-

ing, by mail, written notices of all assessments due to all such members, and even to others who requested it. It is true that the president says that he told such members as spoke to him on the subject that this was a matter of courtesy, and not of right; but he does not pretend that he made such statement to Aroni.

Aroni had ceased to be a member of the Cotton Exchange. Under the custom above indicated, notices were always mailed to his address when assessments became due, and he always paid. The custom was to send notices, as soon as an assessment was posted, to all members who, like Mr. Aroni, were not admitted to the exchange.

In November, 1885, Mr. Aroni was stricken with cerebral apoplexy and softening of the brain, from which date until his death, in the latter part of 1886, he remained in a state of mental incompetency.

Mr. Aroni had an office on Carondelet Street, and resided in rooms on Canal Street, both of which were known to the officers of the association charged with giving notices. In February, 1886, two deaths occurred, of which notices were received at his office, and his son, Mr. Ernest Aroni, promptly paid the assessments.

On March 27, 1886, another member, Mr. Friedlander, died. No notice was ever received of this death, either at the office or residence of Mr. Aroni. Mr. Mellen, his friend and associate in much legal business, testifies that he regularly examined his mail, and that no such notice came; if it had, he would have attended to it. Mr. Ernest Aroni states he was with his father day and night at his residence, and that no such notice came there.

The officers of the association testify that notices were sent out as usual, and they presume one was sent to Mr. Aroni, but they do not profess to remember it as a fact, or to have any record of any kind to confirm their impression based simply on their ordinary course of proceeding. The liability to accidental omission in sending a large list of notices is too great to justify us in giving to this testimony sufficient weight to overthrow the presumption resulting from the fact that all other notices sent reached their destination, and that this one certainly did not.

Another fact still more strongly weighs against the defendant. On the 31st of March, 1886, Mr. R. N. Lewis, another member, died. This was several days before the expiration of

ten days from the death of Friedlander, at a time when Mr. Aroni was in no manner in default, when the custom clearly entitled him to immediate notice of the assessment, and when there was no excuse for not sending it. If the former notice had simply been miscarried in the mail, it is not likely that a similar accident would have happened a second time.

If the latter had been received, all the consequences of the former accident would have been averted. Yet it is admitted that, in this case, no notice was sent. The admitted failure to give notice in this case, being without excuse, supports the probability of failure in the former, and places the association in fault.

There is not the slightest ground for attributing the failure to pay these assessments to any other cause than want of notice. As soon as the default came to the knowledge of the beneficiaries, and long before the death of Mr. Aroni, the parties immediately tendered payment of all assessments due, and demanded the reinstatement of Mr. Aroni, which was refused.

We therefore accept and treat it as a fact in the case that Mr. Aroni was not notified of any assessment which he failed to pay, unless the simple posting in the exchange operated as a sufficient notice.

The learned counsel for defendant vigorously maintain that Mr. Aroni was entitled to no other notice than the posting; that the charter is a contract to which he was a party, and by the terms of which he is bound, and that he had not, and no action of the officers of the company could confer upon him, a right to any other notice than that which the charter declared should be sufficient.

We can discover no possible reason why the defendant should be exempt from the application of the principles of equitable estoppel, which operate upon all other persons, natural or juridical, nor why the mere fact that there was a contract should bar their application.

In matters affecting the execution of contracts, there would never be any occasion for invoking the doctrine of estoppel if the party had complied with the terms of his contract, because such compliance would be, of itself, a sufficient basis for his legal right.

It is only when the terms have admittedly not been complied with that the question arises whether the other party

has, by his representations or conduct, estopped himself from setting up such non-compliance as a ground of forfeiture.

Says Mr. Bigelow: "Where a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things": Bigelow on Estoppel, Introduction, p. 64.

There can be no doubt that the long-continued practice of the defendant company to send Mr. Aroni prompt notice of every assessment as soon as made justified him in believing that he would receive such notices, and in acting on the belief that by paying when so notified his rights would be protected.

The case is very much stronger than that of ordinary insurance, where a fixed premium is due at a date certain, and where the insured, independently of any notice, is fully advised of his duty in the premises. Here notice of some kind was absolutely essential in order to inform the insured that anything was due. But even in the former class of cases, it has been universally held that, however positive the terms of the contract in requiring payment, unconditionally, of the premiums when due, yet if the company pursues the practice of notifying its policy-holder before the maturity of his premiums, the latter would have the right to expect and to rely on receiving such notice, and that if the company failed to send it in a particular case, it would be estopped from claiming a forfeiture for non-payment at the exact time.

This has been held by the supreme court of the United States, using the following language: "Forfeitures are not favored in the law, and courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting on the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the contract. . . . In the present case, it appeared that the company had discontinued its agency at the place of residence of the insured soon after the policy was issued, and had given him notice by mail, from

time to time, where and to whom to pay them. Such notice, it would seem, had never been omitted prior to the maturity of the last installment. The effect of the judge's charge was, that if this was the fact, and if no notice had been given on that occasion, and the failure to pay the premium was solely due to the want of such notice, it being ready and being tendered as soon as notice was given, no forfeiture was incurred. We think the charge was correct under the circumstances of this case. The insured had good reason to expect and to rely on receiving notice to whom and where he should pay that installment. It had always been given before," etc.: *Insurance Co. v. Eggleston*, 96 U. S. 572.

The same doctrine was reiterated in a later case, and was extended to a case where the insurance company was in the habit of receiving the premium though tendered a few days after maturity, and was held to be thereby estopped from claiming a forfeiture when the premium was tendered in a reasonable time after maturity: *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; see also *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *Attorney-General v. Continental Life Ins. Co.*, 33 Hun, 138; *Insurance Co. v. Tullidge*, 39 Ohio St. 240; *Manhattan Life Ins. Co. v. Smith*, 44 Id. 156; 58 Am. Rep. 806; *Thompson v. Insurance Co.*, 52 Mo. 469; *Fitzpatrick v. Mut. & Ben. Life Ins. Co.*, 25 La. Ann. 444.

The case last quoted fully recognizes the authority of a mutual benefit association, like the defendant, to change the method of notice provided in the charter, and held the company estopped from setting up a forfeiture under the charter notice, where the new notice adopted had not been given.

We consider the present case as fully covered by the principles above set forth.

Judgment affirmed.

EQUITABLE ESTOPPEL, HOW CREATED: *New York Rubber Co. v. Rothery*, 107 N. Y. 310; 1 Am. St. Rep. 822, and note 826; *Weinstein v. National Bank*, 69 Tex. 38; 5 Am. St. Rep. 23, and note 28; *Bynum v. Preston*, 69 Tex. 287; 5 Am. St. Rep. 49, and note 53.

WAIVER OF FORFEITURES PROVIDED FOR IN POLICIES OF INSURANCE: See *Continental Life Ins. Co. v. Yung*, 113 Ind. 159; 3 Am. St. Rep. 630, and note 637.

WEEKS v. NEW ORLEANS, SPANISH FORT, AND
LAKE RAILROAD COMPANY.

[40 LOUISIANA ANNUAL, 800.]

ONE STANDING UPON OR CROSSING RAILROAD TRACK TO BOARD MOVING TRAIN WHICH HAS LEFT STATION is not in a position that makes the railroad company a guarantor of his safety, or exempts him from the obligation of using proper care for his self-protection, although passengers crossing the track at a station, to board or leave a train halted for that purpose, are not held to the exercise of the same care and vigilance that are ordinarily exacted from persons crossing railroad tracks; but are authorized to assume that the company will so regulate its trains that they will be safe from harm on the track which they are thus invited and required to cross.

ATTEMPT TO BOARD MOVING RAILROAD TRAIN IS SUCH CONTRIBUTORY NEGLIGENCE as will bar a recovery for injuries received in making such attempt.

ONE WHO STANDS ON RAILROAD TRACK IN FULL VIEW OF APPROACHING TRAIN, which rings its bell and blows its whistle, without using his senses to guard against the danger to which he is exposed, being absorbed in an effort to board a moving train, is guilty of such contributory negligence as will bar a recovery.

ACTION to recover damages for negligence. The opinion states the case.

Robert Mott, Harry H. Hall, and C. P. Drolla, for the appellant.

Walter D. Denegre, for the appellee.

FENNER, J. At the point with which we are concerned, the defendant's double-track railroad runs along Bienville Street.

At the intersection of Bienville and Napoleon streets lies, on one side of Napoleon Street, a square known as Loeper's Park, and on the other or city side a vacant square known and used as a base-ball green.

Loeper's Park contains a garden, buildings, places of refreshment, dancing-platform, etc., and is used for picnics and a place of resort on Sundays. Its entrance-gate is on Bienville, about thirty-five feet from Napoleon Street.

On Sunday, August 8, 1886, defendant's train, coming from the lake to the city along the track farthest from the park and base-ball green, stopped at Loeper's Park gate, and took on a number of passengers. It then moved on, and while moving, twenty-five or thirty boys, who had been engaged in base-ball on the green, came running towards the train, crossing the intervening track or being upon it, and began boarding the

moving train. All succeeded in catching on except the son of plaintiff, an intelligent boy of fifteen years, who waited for the rear coach, and was standing on or near the intervening track when the out-going train running on said track came along, and struck him, inflicting severe injuries. The point at which he was struck was about one hundred feet from Loeper's Park gate, which point had been reached by the rear car of the incoming train.

The present action is brought to recover damages for the injury thus inflicted.

The substantial allegations of the petition, as to the grounds of liability, are, "that the injury was caused by the gross negligence, carelessness, and want of skill of the defendant's agents and employees"; that the boy "was lawfully in the position occupied by him when run over, about boarding the incoming train at the spot where he was run over, and where said trains usually stopped for Loeper's Park"; and that "the said minor was in no way negligent or at fault."

We quote the language of the supreme court of the United States as follows:—

"The question in such cases is: 1. Whether the damage is occasioned entirely by the negligence or improper conduct of the defendant; or 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of personal care and caution that, but for said neglect or want of care and caution on his part, the misfortune would not have happened. In the former case the plaintiff is entitled to recovery, and in the latter he is not": *Railroad Co. v. Jones*, 95 U. S. 441.

The same doctrine is fully sustained by our own jurisprudence, and was announced by us in the following terms: "Where the injury results from the negligence of plaintiff and the negligence of the defendant in such a manner that the negligence of each may be considered as a juridical cause of the injury, the law will not undertake to apportion either the blame or the damage": *Summers v. Crescent C. R. R. Co.*, 34 La. Ann. 144; 44 Am. Rep. 419; *Childs v. New Orleans City R. R. Co.*, 33 La. Ann. 156.

1. The main ground upon which negligence is imputed to defendant is, that the out-going train was violating the following general order issued for the government of its conductors and engineers:—

"Under no circumstances will you allow your trains to pass

each other while taking on or discharging passengers at street crossings. In cases where trains meet at street crossings, the rear coach of the train having the crossing must have passed the pilot of the waiting engine before such engine is permitted to start."

We think it very clear that this order only means that one train shall not run by another when the latter is stopped at a street crossing or other stopping-place, taking on or discharging passengers, but in such case must halt and stand until the latter train has started and entirely passed the pilot of the waiting engine. The rule is an eminently proper one, and if the accident had resulted from its violation, and the boy had been run over while properly and lawfully boarding a halted train at its stopping-place, the fault of defendant would have been so gross that only the clearest proof of contributory negligence equally gross could have saved defendant. Even independently of the violation of its own express rule, the case would then have fallen under the domination of a well-considered line of authorities, which hold, in substance, that passengers, crossing a track at a station to leave or get on a train halted for that purpose, are not held to the exercise of the same care and vigilance which are ordinarily exacted from persons crossing railroad tracks, but are authorized to assume that the railroad corporation will so regulate its trains that he will be safe from harm on the track while he is thus invited and required to cross in order to secure his passage: *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. New York etc. R. R.*, 84 Id. 241; *Klein v. Jewett*, 26 N. J. Eq. 474; *Jewett v. Klein*, 27 id. 551.

But in the instant case, the evidence makes it clear that the in-going train had completed its stop, and was actually moving on before the out-going train was near, and that the latter was therefore not required to halt under the letter or spirit of the rule, but had the right to assume that the operation of receiving and discharging passengers had been completed, and that it might safely pass.

In point of fact, the engine of the out-going train passed the last car of the in-coming train at a point considerably beyond Napoleon Street, both trains being entirely clear of the crossing, and at this point the boy was injured.

So far as appears from the evidence, the operation of receiving and discharging passengers was completed, and the track was clear until this crowd of boys came running from the

base-ball ground to board the moving train, and crossed or occupied the track in front of the out-going train, and so little in advance of it that it is doubtful whether it could have been stopped in time to avoid the accident.

The evidence on the last point is contradictory, but even granting that the boys were on the track when the out-going train was farther off, yet the officers of the latter might well have assumed that they would succeed in boarding the other train, or otherwise get out of the way in time; and in point of fact, all actually did so, except young Weeks.

Although the petition alleges that the spot where the boy was hurt was where "the trains usually stopped for Loeper's Park," yet there is some effort to show that the trains were in the habit of slowing up, without stopping, for the purpose of receiving or discharging passengers at the base-ball green, and that therefore the boys, in thus boarding the moving train, were acting on the invitation of defendant, and thus stood under its protection.

We have examined the evidence on this point with great care, and far from establishing such custom or habit, it very clearly establishes that when the train had passengers to receive or discharge either for the green or the park, it stopped, and that its stopping-place was Loeper's Park gate, which, on Sundays and picnic days, was a regular stopping-place, and on other days was a signal-station, where it stopped when signaled. No doubt boys from the green did sometimes jump on or off the train as it moved slowly away from or up to its stopping-place at the gate; but this was not by invitation of the company, which stopped its trains for the purpose of receiving or discharging passengers at this point, and had the right to expect that such passengers would board or leave the train while thus halted. On this occasion, the train undoubtedly did stop, and ample opportunity was afforded Weeks to take his passage in a lawful and proper manner.

We need not discuss other features of negligence charged against the defendant, deeming it sufficient to show that at the time of the accident Weeks was not in the position which he occupied under any circumstances which made defendant the guarantor of his safety, or exempted him from the obligation of using proper care for his self-protection.

2. This brings us to the question of contributory negligence.

The boy Weeks was attempting to board a moving train, which is universally recognized as a negligent and indiscreet

act, constituting such contributory negligence as will debar him from recovering for injury received while so engaged: Wood's Railroad Law, 1155; *Knight v. Pontchartrain R. R.*, 23 La. Ann. 462; *Phillips v. Rensselaer & S. R. R.*, 49 N. Y. 177; *Chicago & N. W. R. R. Co. v. Scates*, 90 Ill. 586.

In addition to this, he was upon or in dangerous proximity to a railroad track, in a position which, the authorities universally agree, threw upon him the duty of looking and listening, and using all his senses to discover and avoid the danger necessarily incident to such a situation.

Said the supreme court of the United States in a case much more favorable to the injured party than this: "The failure of the engineer to ring the bell or sound the whistle, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees was no excuse for negligence on her part. She was bound to listen or to look before attempting to cross the track, in order to avoid an approaching train, and not walk carelessly into the face of possible danger. Had she used her senses, she could not have failed by them to hear and see the train which was coming. If she made use of them and walked thoughtlessly on the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain. If, using them, she saw the train coming, and yet undertook to cross the track instead of waiting for the train to pass, and was injured, the consequence of her mistake and temerity cannot be cast upon the defendant. No railroad can be held for failure of that kind. If one chooses, in such a position, to take risks, he must bear the consequences of failure": *Railroad Co. v. Houston*, 95 U. S. 701; 2 Wood's Railroad Law, 1302-1324, and cases there cited; *Houston v. Vicksburg etc. R. R. Co.*, 39 La. Ann. 796.

Now, in the instant case, Weeks was not merely crossing, but standing on a track, in full view of a nearly approaching train, which rang its bell and sounded its whistle. Everybody else saw the train and heard its signals, and with the slightest use of his own senses he might and should have done so. His failure was attributable solely to his eager absorption in the performance of an act in itself improper, indiscreet, and negligent.

Under such circumstances, it is impossible to absolve him

from the charge of gross contributory negligence, and to cast upon the defendant the consequence of his own fault.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of defendant, and rejecting plaintiff's demand at her cost in both courts.

DUTY OF RAILROAD COMPANY TO KEEP ITS PREMISES IN SAFE CONDITION: *Wabash etc. R. R. Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193, and note 208; *McKone v. Railroad Co.*, 57 Mich. 601; 47 Am. Rep. 596.

CONTRIBUTORY NEGLIGENCE IN BOARDING MOVING TRAIN: See *Solomon v. Manhattan R'y Co.*, 103 N. Y. 437; 56 Am. Rep. 843; 57 Am. Rep. 760.

DUTY OF TRAVELER AT RAILWAY CROSSING or station to look out for approaching trains: See *O'Connor v. Missouri Pac. R'y Co.*, 94 Mo. 150; 4 Am. St. Rep. 364, and cases collected in note 368.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

PHENIX INSURANCE COMPANY v. WILLIS.

[70 TEXAS, 12.]

GARNISHMENT. — ISSUE OF WRIT OF GARNISHMENT, FOR PURPOSE OF ATTACHING the amount due on a policy of insurance, is not premature because at the time of its issuance no proof of loss had been made, and by the terms of the policy proof of loss was required before the company could be held liable to pay. Writ of garnishment is not, strictly speaking, an action for the recovery of a debt, but is more in the nature of a bill of discovery, and may be filed in anticipation that a debt or other obligation will mature at some future time.

WHEN PLAINTIFF CONTESTS ANSWER OF GARNISHEE, SPECIFYING in what particulars he believes it untrue, under oath, it is not necessary that the allegations upon which the issue is made up should be sworn to.

INSURANCE. — FRAUD AS BAR TO RECOVERY FOR LOSS UNDER POLICY. — The assignee of a policy of insurance containing a provision "that all fraud or attempt at fraud, by false swearing or otherwise, shall be a complete bar to any recovery for loss under it," cannot enforce a recovery, although the assignment was made with the consent of the insurance company, if the transfer proved to be fraudulent as to creditors, of which the company was ignorant when it consented to the transfer; and this is so, although the assignee was the local agent of the company.

INSURANCE COMPANY MAY INSIST UPON THE INVALIDITY of its policy, for breach of conditions therein, and thus avoid liability for a loss, without returning or offering to return any portion of the premiums paid.

CREDITORS OF INSURED CANNOT COMPEL PAYMENT OF THE POLICY by process of garnishment against the insurance company, if the insured himself has forfeited the right to enforce collection by violating conditions contained in the policy.

Mazey and Fisher, and Matthews and Wood, for the appellants.

Acker and Abney, for the appellee.

MALTBIE, P. J. On the 5th of October, 1883, G. W. Scott obtained a policy of insurance on a house in Lampasas for one year, from P. M. Hargrave, who was the local agent of appellant, the Phenix Insurance Company, of Brooklyn, New York, and on the fifteenth day of November thereafter, Scott, with the consent of the company, transferred said policy to the said P. M. Hargrave, he having a short time before purchased the property insured from Scott, and received a general warranty deed to the same. These transfers were made without consideration, and with intent on the part of both Scott and Hargrave to defraud the creditors of the said Scott; but this intent was not known to the insurance company until after the destruction of the building by fire, which occurred on the fourteenth day of August, 1884. On the thirtieth day of July, 1884, Hargrave made a general assignment of all of his property, including that insured, to Henry Exall, for the benefit of his (Hargrave's) creditors. The insurance company in no way consented to this assignment. Appellees, who were creditors of G. W. Scott, on November 17, 1883, commenced suit against him, and caused an attachment to be levied on the property insured, claiming that the transfer to Hargrave was fraudulent and void, and on the 5th of September, 1884, garnished the insurance company. Notice of the fire was given and proofs of the loss made by said Scott, on the 6th of September, in proper form, he then claiming that the transfer of the property to Hargrave was intended as a mortgage, and on the 17th of the month the insurance company, through its general agent, denied all liability to Scott, and afterwards, in answer to the garnishment, denied, under oath, that it was indebted or in any way liable to Scott on the policy of insurance, which was controverted by appellees by a written affidavit.

It is contended by appellant that the garnishment was prematurely filed, because at the time of its issuance no proof of loss had been made, and by the terms of the policy proof of loss was required before the company could be held liable to pay. It has been frequently held that making proof of loss, where there is such a stipulation in the policy as is in this, is a condition precedent, and must be complied with before suit can be maintained for the recovery of the amount of the policy: *East Texas Ins. Co. v. Dyches*, 56 Tex. 565; *O'Brien v. Commercial Fire Ins. Co.*, 63 N. Y. 108; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415.

But we are of opinion that the issuance of a writ of garnishment is not, strictly speaking, an action for the recovery of a debt, but is more in the nature of a bill of discovery, and may be filed in anticipation that a debt or other obligation will mature at some future time. This practice is evidently contemplated by our statute of garnishment. In this instance, the property having been destroyed by fire, the agreement to pay the policy was no longer contingent, but had become absolute by the happening of the event mentioned in the policy, subject to be defeated, however, by defenses pleaded and proven, as might be done in other cases of debt. Consequently the garnishment was not prematurely issued.

Nor do we think it necessary that the controverting affidavit to appellant's answer should contain all the allegations necessary to authorize a recovery on the policy in an ordinary suit at law. Article 211 of the Revised Statutes provides that the plaintiff may contest the answer of the garnishee, if he believes it incorrect, by affidavit in writing, stating in what particulars he believes the same untrue; while article 213 provides that in such cases an issue shall be formed, under the direction of the court, and tried as in other cases, giving the court plenary power in reference to the formation of the issue, so far as mere form is concerned. "All that can be required of the plaintiff is, that he state the facts on which he relies to establish the liability of the garnishee with sufficient certainty to enable the latter to prepare for his defense": *Adkins v. Watson*, 12 Tex. 199, 200. In this case the complaint is not that the plaintiffs in their pleadings failed to state such facts as were necessary to enable the garnishee to make its defense, but that the pleadings were not sworn to. We think it sufficient that the controverting affidavit was under oath; there is no law requiring that the allegations upon which the issue is made up should be sworn to.

The principal question in the case yet remains: Was appellant liable on its policy to the creditors of Scott? The company was induced to give its consent to the transfer of the policy upon the false representation that Hargrave had become the owner of the property insured, while the proof showed that the understanding was, that the transfer from Scott to Hargrave should be a mere cover to enable Scott to effect a favorable compromise with his creditors, he being at the time largely indebted; and, no consideration having passed, the transfer was fraudulent and void as to his creditors.

It is provided in the policy "that all fraud or attempt at fraud, by false swearing or otherwise, shall be a complete bar to any recovery for loss under it." The company doubtless understood, and it was without doubt intended by Scott and Hargrave that it should understand, that there had been a complete and valid transfer of the property as to all persons; but it being invalid as to the creditors of Scott, created such a state of confusion and doubt as to the ownership of the policy as rendered it hazardous to pay the loss to any one. This was to the disadvantage and detriment of the company, and calculated to provoke litigation, and, having been induced by false representations, was a fraud upon it, which it had provided against in its policy.

But it is objected that, conceding the fraud would ordinarily avoid the obligation of the policy, yet Hargrave being the agent of the company, and having knowledge of the fraud by reason of his own participation therein, the appellant is chargeable with his knowledge, and for that reason must be held to have waived its right to insist on the condition of the policy before referred to, though it was in fact ignorant of the fraudulent intent of Scott and Hargrave.

It is well settled that the knowledge of the agent will be imputed to the principal in matters where the agent is acting in the scope of his authority, and that the principal cannot avail himself of the fruits of his agent's fraud on account of his ignorance of such fraudulent conduct: *Kerr on Fraud and Mistake*, 111, 112; *May on Insurance*, 142; *Wright v. Calhoun*, 19 Tex. 421.

But Hargrave, in procuring the transfer of the policy from Scott to himself, was not representing the company, nor was the act for its benefit, it being a matter of indifference to the company to whom the policy was payable; the transfer being at the request and for the accommodation of Scott, no valid reason is perceived why appellant should be estopped from insisting on the conditions of its policy. And in order to do so, it was not necessary to return or offer to return any portion of the premium after discovering the fraud: *Blaeser v. Milwaukee Mech. Mut. Ins. Co.*, 37 Wis. 39, 40; *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 161.

There is another view of the case, also, fatal to appellee's right to recover. As a general rule, the plaintiff cannot acquire any greater rights against the garnishee than the defendant himself possesses, unless the garnishee be in possession of

effects of the defendant under a fraudulent transfer: Drake on Attachment, 5th ed., par. 458. There are certain exceptions to the rule, it is true (Id. 464), but the facts of this case are not within any of them. The transfer of the policy from Scott to Hargrave being with intent to defraud the creditors of the former, no trust could result in favor of Scott, whatever the understanding between himself and Hargrave may have been; and the legal title being in Hargrave's assignee, Exall, Scott could not recover, and as a consequence appellees cannot, appellant not being in any way tainted with the fraud of Scott, nor having any of the fruits thereof in its possession.

In view of the foregoing, we are of opinion that the judgment should be reversed, and here rendered for appellant.

INSURANCE COMPANY, WAIVER BY OF COMPLIANCE WITH CONDITIONS in the policy as to proof of loss: *Commercial Union Assurance Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562, and note 565-572. Power of local agent to waive notice and proof of loss: *Bowlin v. Insurance Co.*, 36 Minn. 433.

INSURANCE COMPANY IS LIABLE AS GARNISHEE or trustee of the insured after a loss, though the property insured was exempt from attachment: *Wooster v. Page*, 54 N. H. 125; 20 Am. Rep. 128.

POLICY OF INSURANCE VOID, IN THE HANDS OF THE INSURED by reason of misrepresentations, will be equally void in the hands of an assignee, although the company assent to the assignment: *Citizens' Fire Ins. Co. v. Doll*, 35 Md. 89; 6 Am. Rep. 360.

MORRIS v. HASTINGS.

[70 TEXAS, 26.]

EXECUTIONS. — SALE OF LOTS UNDER EXECUTION AGAINST DEFENDANT IS NOT VOID, because of an irregularity in the notice of sale, reciting that the lots were levied upon and would be sold as the property of the defendant's wife.

WHEN NOTICE OF SALE UNDER EXECUTION HAS NOT BEEN PROPERLY GIVEN, and objection is made by the defendant in execution without unnecessary delay, the sale may be set aside; but the objection will be considered as waived if not made in a reasonable time.

EXECUTION SALE, AVOIDANCE OF. — IN COLLATERAL PROCEEDING, IT IS NOT ESSENTIAL TO VALIDITY of an execution sale that there should have been an advertisement of the property. But if such irregularity is brought about by the fraud and collusion of the purchaser, and the property sells for a grossly inadequate price, the sale may be avoided as to such vendee and those claiming under him with notice.

CONSTRUING TEXAS REVISED STATUTES, ARTICLES 2309 AND 2319, RELATING TO EXECUTION SALES, it was not the intention of the legislature that sales of property under execution should be declared void on account of mere irregularities in advertising, or because of a failure to advertise

such property, but that the injured party should look to the officer for all damages thus occasioned, it being in the interest of the public that execution sales should be sustained.

HUSBAND AND WIFE — COMMUNITY PROPERTY. — IT IS SETTLED LAW IN TEXAS THAT ALL PROPERTY ACQUIRED during marriage is presumed to belong to the community, whether the conveyance is to the husband or wife, or both, and the burden of proving that it is the separate property of either is on the party asserting it. And in order to show that property purchased during the marriage is the separate property of one of the spouses, the fund with which it was acquired must be clearly shown to have been the separate property of such person, and this will not be inferred except from circumstances of a conclusive tendency, if at all.

EVIDENCE IN THE PARTICULAR CASE NOT DEEMED SUFFICIENT to establish, with that degree of certainty required by the law, the separate interest of the wife in property conveyed to her after marriage.

McCampbell and Givens, and Stanly Welch, for the appellant.

Waul and Walker, for the appellees.

MALTBIE, P. J. This was an action of trespass to try title, brought by the appellant, Emanuel Morris, against C. B. Hastings and his wife, Gumicinda P., to recover a house and three lots upon which it was situated. On the 17th of March, 1882, Morris recovered a judgment against C. B. Hastings, upon which execution was issued, and the property in controversy levied upon and sold by the sheriff of Starr County, and purchased by Morris, the amount of his bid at the sale being credited on the execution. C. B. Hastings and wife were married in the year 1871, and lived together until her death in the year 1885. The lots in dispute were conveyed to her by John Vale, on the 31st of June in the year 1879, and the house was built in the same year. After Mrs. Hastings's death, her children were made parties defendant, and claimed that the house and lots were her separate property. On the trial the following charge was given at the request of defendants: "The jury are instructed that if they find, from the evidence, that the house and lots in question were not levied on by the sheriff as the property of the defendant, C. B. Hastings, but were levied upon as the property of Gumicinda P. Hastings, then a sale under and by virtue of such levy as against the defendants will not be a valid sale, and you will find for the defendants." This is assigned as error. It does not appear that the property was sold as belonging to Mrs. Hastings; nor is it stated in the levy to whom it did belong. Appellant exhibited a valid judgment and execution against

C. B. Hastings, and read in evidence a sheriff's deed, reciting that the property was levied on and sold by virtue of the judgment and execution as the property of C. B. Hastings, and purchased by himself. While the only evidence introduced by appellees on this subject was a notice which was identified by the officer who posted it and made the sale as being one of the notices under which the sale was made, and who also stated that the others were of similar import, which notice recited that the lots were levied on and would be sold as the property of Mrs. Gumicinda Hastings to satisfy appellant's execution against C. B. Hastings. The description in the levy of the property was correct, and the only defect in it is, that it does not state that it was levied upon as the property of the defendant, C. B. Hastings; and the notice also correctly describes the lots, but states that they were levied upon as the property of Mrs. Hastings. When notice of the sale has not been properly given, if application be made by the defendant in execution without unnecessary delay, the sale may be set aside. But the notice of the sale, being for the benefit of the defendant, will be considered waived if not made in a reasonable time: *Freeman on Executions*, 286. And in a collateral proceeding it is not essential to the validity of the sale that there should have been an advertisement of the property: *Howard v. North*, 5 Tex. 308, 309. Though if such irregularity is brought about by the fraud and collusion of the purchaser, and the property sells for a grossly inadequate price, the sale may be avoided as to such vendee and those holding under him with notice: *Stone v. Day*, 69 Id. 13.

Our Revised Statutes do not provide that sales of land made by sheriffs or constables under execution without notice or upon insufficient notice shall be void. On the contrary, while article 2309 provides that such sales shall be advertised by posting notices, article 2319 declares that any officer who shall sell any property without giving the previous notice herein directed shall forfeit and pay to the party injured not less than ten nor more than two hundred dollars, in addition to such other damages as the party may have sustained. From which we think it is manifest that the legislature did not intend that sales of property under execution should be declared void on account of mere irregularities in advertising or a failure to advertise such property, but that the injured party should look to the officer for all damages thus occasioned; it being in the interest of the public that execution sales should

be sustained. Nor do we think that it could be inferred from the evidence before the court, which was all in writing, that the lots were either levied on or sold as the property of Mrs. Hastings; and therefore there was error in submitting that issue to the jury. There was a verdict for the defendants, and the sufficiency of the evidence to authorize it is questioned by an appropriate assignment. It is settled law in this state that all property acquired during the marriage is presumed to belong to the community, whether the conveyance is to the husband or wife, or both, and the *onus* of proving that it is the separate property of either is on the party asserting it. And it has been uniformly held, since the case of *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41, down to and including the late cases of *King v. Gilleland*, 60 Tex. 271, and *Epperson v. Jones*, 65 Id. 425, that, in order to show that property purchased during the marriage is the separate property of one of the spouses, the fund with which such property was acquired must be clearly shown to have been the separate property of such person; and this will not be inferred except from circumstances of a conclusive tendency, if at all. C. B. Hastings was the only witness examined in behalf of appellees. He deposed, in substance, that he was married in 1871; that his wife then owned two or three hundred dollars in cash; that he gave her at the time of the marriage over one hundred dollars; that she afterwards engaged in keeping a boarding-house and a millinery store on her own account; that he did not know whether she made or lost money in these pursuits; that he had known her to borrow money of her father, — how much or what she did with it he did not know; that his wife kept her own money. He further testified that the property in controversy was purchased with the separate means of his wife; that she gave \$112.50 for the lots, and erected a house on them at a cost of \$800; that the purchase was made while he was in New York; that he did not know from what source his wife obtained the four or five hundred dollars in excess of the amount that she had at the time of her marriage, that she expended in erecting the house on the lots. A witness for defendant testified that he had heard Mrs. Hastings say that she made money in keeping her boarding-house, and in the millinery business also; that he thought she did. This was all the evidence on the subject, and we are of opinion that it does not establish, with that degree of certainty required by the law, that the property in controversy was paid for entirely out of the separate estate

of Mrs. Hastings, but, in view of another trial, abstain from discussing it. We think that the receipt from Porcheller, acknowledging the receipt of money paid by Mrs. Hastings for building the house, and the tax receipts, showing a payment of taxes by her on the property for the years 1880, 1881, 1882, 1883, were admissible as tending to show an assertion of title by her to the property in her own right, before and after the judgment was obtained against her husband under which the lots were sold. But for the errors before indicated, we are of opinion that the judgment should be reversed and cause remanded.

JUDICIAL SALE, SUFFICIENCY OF NOTICE OF: *Trustees of Schools v. Snell*, 19 Ill. 156; 68 Am. Dec. 586; *Montour v. Purdy*, 11 Minn. 384; 88 Am. Dec. 88; *Hoffman v. Anthony*, 6 R. I. 282; 75 Am. Dec. 701, note 704-713; *Howland v. Pelley*, 15 R. I. 603; *Clements v. Williamson*, 5 Del. 25.

IRREGULARITIES IN EXECUTION SALES which are not fatal: See *Ayres v. Duprey*, 27 Tex. 593; 86 Am. Dec. 657, and note 668.

AS A GENERAL RULE, IT IS ONLY THE EXECUTION DEFENDANT who can avail himself of an irregularity, even by a proceeding instituted before the sale is made: *Johnson v. Murray*, 112 Ind. 154; 2 Am. St. Rep. 174, and note 177. One who claims in character of judgment creditor cannot avail himself of a mere irregularity to defeat a consummated sale: *Johnson v. Murray*, 112 Ind. 154; 2 Am. St. Rep. 174.

PRESUMPTION ATTENDING POSSESSION of property by either spouse is that it belongs to the community: *Meyer v. Kinzer*, 12 Cal. 247; 73 Am. Dec. 538; *Atholf v. Conheim*, 38 Cal. 230; 99 Am. Dec. 363; *Peck v. Brummagim*, 31 Cal. 440; 89 Am. Dec. 197; *Cook v. Bremond*, 27 Tex. 457; 86 Am. Dec. 626, and note 629.

WILLIS v. McINTYRE.

[70 TEXAS, 34.]

DEBTOR AND CREDITOR—RIGHTS OF DONEE IN POSSESSION UNDER PAROL GIFT OF LAND.—Where a debtor makes a parol gift of land, and the donee goes into possession and makes improvements on the strength of it, claiming the land as his own, and afterwards receives a deed for the land in accordance with the gift, a creditor of the donor cannot, after the latter becomes insolvent, attach the land and subject it to the payment of his claim, credit for which was extended after the date of the parol gift, and after the donee was in the actual occupancy of the premises.

PAYMENTS, APPROPRIATION OF.—WHEN THERE IS A CONTINUOUS ACCOUNT, consisting of many items, if no appropriation of payments is made by either party, they will be applied according to the priority of time. The item of earliest date will be discharged, or so far satisfied as the first payment may extend, and in this order will every payment be appropriated.

WHERE NEITHER PARTY MAKES APPROPRIATION OF PAYMENTS, UNTIL the rights of third persons holding under the debtor are such as might be enforced against him, the creditor cannot thereafter so appropriate payments as to affect such rights, if, by a different appropriation, they can be protected.

RIGHT OF DEBTOR TO HAVE PAYMENTS MADE ON ACCOUNT APPROPRIATED to specific items will be denied, when this becomes necessary for the protection of one having equities against the debtor, such as would authorize against him a decree for the specific performance of a verbal gift of land.

W. W. Meacham and H. H. Boone, for the appellants.

McDaniel and Buffington, for the appellees.

STAYTON, A. J. This is an action of trespass to try title, instituted by the appellants to recover $316\frac{3}{4}$ acres of land. The defendants disclaimed as to fifty-two acres, but the defendants McJunkins and Garvin asserted title to the remainder. Mrs. Garvin and Mrs. McJunkins were daughters of J. C. McIntyre, who was the owner of the land prior to December, 1878. In that month McIntyre made a parol gift of $132\frac{3}{8}$ acres of the land to his daughter, Mrs. Garvin, and her husband, and in the following March he made a gift in the same manner to Mrs. McJunkins and her husband for the same quantity of the land. These parties, immediately after the gifts were made, entered into possession of the tracts to them severally given, and have continuously held them since; during this time, and prior to the time appellant caused an attachment to be levied on the land, Garvin had made permanent and valuable improvements on the land given to himself and wife, which the judge trying the case valued at \$575; and during the same time, McJunkins and wife had made like improvements on the land given to them, which were valued at \$375. The land was worth about four dollars per acre, and encumbered with a vendor's lien for about \$650, which was discharged by one of the donees. Subsequently to the levy of a writ of attachment sued out by the appellants, in an action brought by them against McIntyre, the latter executed deeds to the persons to whom he had made verbal gifts, in accordance with the gifts. Deeds seem to have been prepared soon after the gifts were made, but for some reason were not executed and delivered.

On February 22, 1881, appellants brought an action against McIntyre on a note for \$3,471.44, executed to them by McIntyre March 1, 1880, and due on October 1st following. In that

case, a writ of attachment issued which was levied on the land in controversy on February 23, 1881. A judgment was rendered in that cause against McIntyre on April 14, 1882, foreclosing the attachment lien, under which the land was sold and bought by the appellants, who received a deed from the sheriff dated June 6, 1882. This cause was tried without a jury, and the court gave conclusions of fact and law.

From the conclusions of fact, as well as from the statement of fact, it appears that the appellants were wholesale merchants doing business in Galveston, and that McIntyre was a retail merchant doing business in Grimes County, and that between them, from about the year 1868, a business had been conducted as is usual between such merchants. After stating that statements of balances were frequently made by appellants, the third finding is as follows: "That such balances were frequently closed by note, and then other purchases were made on open account, and frequently when notes were given to cover balances, McIntyre had cotton in hands of plaintiffs. When cotton was sold, the notes or open balance due on last statement and amount of subsequent purchases were added together as a debt, and the proceeds of cotton credited against it, and the balances again brought down, and thus from year to year, the debt being for a greater or less amount against McIntyre as payments were appropriated by plaintiffs." This shows the general course of dealing between the parties, which continued until about December 7, 1880.

The further finding is as follows: "McIntyre had frequently cotton sufficient in hands of plaintiffs to cover, or practically so, the balances stated on several settlements, but not enough to cover purchases of goods and drafts paid by plaintiffs between the time such balances were struck and the time the cotton was sold and credited."

The thirteenth finding was: "That as to the indebtedness existing to Willis and Brother at the time of these gifts, McIntyre shipped ample cotton to cancel the same, but continued to buy other goods."

After finding that the gifts were not made with fraudulent intent, the court found "that in a legal sense, and under all the facts, McIntyre was in such condition of solvency at the time of the gifts as to warrant him in making them, and leave him abundantly able to pay his debts then existing."

McIntyre stated that in the spring of 1880, he "went down and made a bill of about three thousand dollars, more or less.

I told Willis and Brother I could not pay the bill till fall, and he said close it by note, and I did so, and that was the note I was sued on in Galveston. I owed nothing but that note, and had cotton in the hands of Willis and Brother which they agreed to place as a credit on the note. They sold and placed as a credit, but not, it seems, on the note. I shipped cotton enough to cover note or more; am sure." He further stated that the note for \$3,471.44, due October, 1880, was for goods bought on the day it was executed, and not for balances.

The account of appellants, offered in evidence, shows that McIntyre was credited with \$2,695.95, of date February 26, 1880, which was the net proceeds of fifty bales of cotton; that February 11, 1881, he was credited with \$2,218.31, as the net proceeds of forty-five bales, and that on March 1, 1881, he was credited with \$149.42, as the net proceeds of three bales of cotton. On September 25, 1880, he was credited, by cash, \$1,000, and on October 9th with a like sum. After the execution of the note made the basis of the attachment suit, McIntyre bought goods to the value of something less than \$3,700, and on statement of account, made March 1, 1881, the balance in favor of appellants was \$3,100.32.

The evidence of McIntyre as to the agreement to appropriate the proceeds of cotton to the payment of the note on which the judgment in favor of appellants was obtained was not controverted, but all the credits to which we have referred were placed on the general account, into which the note was carried.

The account offered in evidence by the appellants shows that on March 25, 1880, the note for \$3,471.44 evidenced the only matter of indebtedness between them, and if that was given for goods bought on the day of its execution, appellants were not antecedent creditors who would have right to attack the gifts made by McIntyre to his children. Before the date of that note, the donees were in possession of that land, as they were when it was executed, and the appellants, as subsequent creditors having notice of their rights, could not look to that property for the payment of their debt.

If the note for \$3,471.44 included balances existing at the time the gifts were made, as well as the price of goods sold at the time of its execution, which is evidently true if the appellant's statement of the account is correct, then the appellees would have the right to have the proceeds of cotton applied to its payment, if it was the agreement between appellants and McIntyre that this should be done. Whether, in the absence

of such an agreement, they could assert such a right against an actual appropriation made by the appellants, in the absence of an appropriation by McIntyre, need not be considered.

It appears that the note of date March 1, 1880, was carried with the general account by appellants, and that the judgment obtained on it was only for the balance due on the general account; and it does not appear that payments made by McIntyre were appropriated to any particular parts of the general account, except as this may have been done by bringing suit on February 22, 1881, on the note executed March 1, 1880. It appears from the statement of account made by the appellants that McIntyre was indebted to them \$5,078.30 on January 1, 1878. From January 1, 1878, to December 1, 1878, McIntyre paid \$6,230.74, and in same time bought \$5,950.65, leaving a credit of \$280.09. From December 1, 1878, to June 7, 1879, McIntyre paid \$4,191.91, and bought \$5,459.09 (but of this only \$853.86 was bought before the last gift was made), increasing his account \$1,267.18. From June 1, 1879, to January, 1880, McIntire paid \$5,044.40, nearly all which was offset by purchases. From January 1, 1880, to January 1, 1881, he paid \$2,065.97, and received \$1,447.44 cents, and between January 1, 1881, and January 1, 1882, he paid \$2,367.73, which was passed to his credit on the general account, as were all payments made.

From this statement it will be seen that more money was paid by McIntyre on the general account, if his statement as to the agreement as to appropriation of proceeds of cotton is true, than was necessary to extinguish all indebtedness accruing prior to the time the gifts were made. The account as presented must be deemed one continuous account, and as there is no claim that payments were credited to specific items of the account by the appellants prior to February 22, 1881, we see no reason why the ordinary rule for the appropriation of payments should not be enforced in this case. It would have been the right of McIntyre to have the payments appropriated as he desired, and in the absence of an appropriation by him it was the right of the appellants to make the appropriation as they thought most to their interest, provided the right of no third person had intervened before they exercised this right.

When there is a continuous account, consisting of many items, if no appropriation of payments is made by either party, they will be applied according to the priority of time.

The first item on the debit will be discharged, or so far satisfied as the first payment may extend, and in this order will every payment be appropriated. This is the rule asserted by all the authorities. It has been given application in cases much like the present: *Bodenham v. Purchas*, 2 Barn. & Ald. 46; *Truscott v. King*, 6 N. Y. 147; *Harrison v. Johnston*, 27 Ala. 452; *Crompton v. Pratt*, 105 Mass. 255.

Not having appropriated the payments made until the rights of the persons holding under McIntyre were such as might be enforced against him, could the appellants thereafter make the appropriation in such manner as to affect their rights? The court below, in effect, held not.

The right of a creditor — as between him and the debtor, who has not appropriated a payment — at any time to make the appropriation has been recognized; but this right has been denied, even when its exercise would only affect the right of one holding through the debtor by a conveyance fraudulent as to creditors existing at the time the conveyance was made.

This was held in *Miller v. Miller*, 23 Me. 24, 39 Am. Dec. 597, upon the ground that, as between the grantor and such a grantee, the conveyance is binding; and as no one other than a creditor holding a prior debt can assert its invalidity, even such a grantee may show that on proper appropriation of payments the creditor had no debt at the time the conveyance to himself took effect.

In *Harker v. Conrad*, 12 Serg. & R. 304, it appeared that a lumber merchant had separate liens for lumber furnished for two houses, and received a payment from the debtor of which no actual appropriation was made by the debtor or creditor until after a purchaser without notice of the lien had acquired title to the property upon which one of the liens existed, when the creditor attempted to appropriate the payment made on the debt, to secure which a lien might have been perpetuated by filing his lien, which, however, was not done. It was held that his right time so to appropriate the payment was lost, and the payment made was appropriated on the debt that first accrued.

In *Berghaus v. Alter*, 9 Watts, 386, it appeared that Berghaus purchased at different times several bills of goods on a credit, and gave note therefor with security, which was payable in twelve months, and subsequently he made other purchases on the same terms before the note became due, after which he made payments which were credited generally on

the books of Alter, without any specific appropriation. The seller subsequently attempted, with the consent of the buyer, to appropriate the payments to the payment of the debts last created, but the court said: "It is true, however, that a different appropriation was made afterwards, between the plaintiff and George H. Berghaus, but this was some time after the law had interposed itself and made the appropriation which would go in discharge of the debt for which the note was given. And had no one been interested in the appropriation made by law of the moneys previously received, it would have been perfectly competent for them, by their subsequent agreement, to have changed the appropriation so made by law as they pleased. But then the previous appropriation made by law must, to discharge the defendant below, who, being a mere surety, derived no benefit whatever from the debt, and being once discharged from his liability as such, his obligation could not be received." Many other cases assert the same principles: *Harrison v. Johnston*, 27 Ala. 452; *Crompton v. Pratt*, 105 Mass. 257.

Those cases deny the right of the creditor at all times, and against all persons, to appropriate when the debtor has not done so; and if the law forbids this on account of equities arising between a principal and surety, and in such cases, in the absence of an actual appropriation by the debtor or creditor at the time the payment is made, appropriates it on the oldest items of a general account consisting of items bought at different times, we see no reason why the same protection should not be given to one having equities against his debtor, such as would authorize against him a decree for specific performance of a verbal gift of land.

In the one, the security — a person — is discharged by the appropriation the law makes; in the other, the property ought to be relieved from liability — discharged from suretyship — by the operation of the same law whenever equities calling for this have existence between the debtor and a third person.

The court found that the verbal gifts were not made with an intention to defraud, and the mere fact that McIntyre may have been in debt at the time he made them will not invalidate them, but it is claimed that, exclusive of the property given to his children, he had not sufficient subject to execution and openly held to pay all the debts he then owed. The court found to the contrary, and an examination of all the evidence would not justify our holding that the finding was incorrect.

In fact, if the evidence introduced by the appellees is to be believed, McIntyre had ample means to pay all his debts until 1881, when, by a misfortune not to be anticipated, he suffered a loss which deprived him of capacity to do so. For nearly two years after the gifts were made, and while the facts were transpiring on which the equities of the appellees are based, with notice of them, the appellants continued to extend large credit to McIntyre, as is evidenced by the account they render.

The court also held that the facts shown were such as, between McIntyre and his daughters and their husbands, would entitle the latter to specific performance of the verbal gifts, and we are not prepared to hold, looking to all the evidence, that this holding was erroneous: *Curlin v. Hendricks*, 35 Tex. 225; *Murphy v. Stell*, 43 Id. 123; *Willis v. Matthews*, 46 Id. 478; *Van Bibber v. Mathis*, 52 Id. 409.

From this it follows, even if we could hold that the judgment through which the appellants claim was rendered on a debt created before the verbal gifts were made, that the judgment must be affirmed, and it is so ordered.

DEED IS NOT FRAUDULENT AS TO CREDITORS WHEN MADE TO PERFECT TITLE TO LAND, of which an oral gift had been made to a son by his father, at a time when he was solvent, and when the former, relying upon the consummation of such oral gift, had entered and made permanent and lasting improvements: *Dozier v. Matson*, 94 Mo. 328; 4 Am. St. Rep. 388, and cases collected in note 391.

PAYMENTS, RULE AS TO APPLICATION OF: *Pickering v. Day*, 3 Houst. 474; 95 Am. Dec. 291, and note 313; *Hersey v. Bennett*, 28 Minn. 86; 41 Am. Rep. 271; *Ross v. Crane*, 74 Iowa, 375; *Skiles v. Watson*, 124 Ill. 384. The holder of several unpaid notes, some of which are secured and others unsecured, may, in the absence of any agreement or direction as to the application of payment, apply the money exclusively to the payment of any one of the notes, and is not bound to a *pro rata* application of it: *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597.

GULF, COLORADO, AND SANTA FE RAILWAY COMPANY v. WALKER.

[70 TEXAS, 126.]

RAILROAD COMPANIES — ADOPTION OF NEW APPLIANCES. — It is not the duty of a railroad company to discard reasonably safe machinery, and to adopt a new device for the safety of its employees, until by its general and continued use, or otherwise, its superiority has been established.

RAILROAD COMPANIES — ADMISSIBILITY OF EVIDENCE AS TO NEW APPLIANCES TO SECURE SAFETY OF PERSONS ON RAILROAD TRACK. — A boy, while walking along a railroad track, which was laid in a public street where pedestrians were accustomed to pass, had his foot caught between the rails of a switch, and was run over by a train of the company. In an action against the company to recover damages for the injury thereby sustained, evidence that a simple appliance by which the danger of being thus caught and injured was obviated had been in use on a few railroads in a distant part of the country for four or five years is admissible, in connection with other evidence in the case, that at the place where the accident occurred there were no sidewalks, that no safeguards were used by the defendant, and that without some guard the track was dangerous to brakemen and also to pedestrians passing over it.

RAILROAD COMPANY IS BOUND TO USE A DEGREE OF CAUTION CORRESPONDING to the danger of operating its trains over the street of a city, when, by reason of the absence of sidewalks, persons might be expected to walk along and across the tracks.

Jones and Garnett, for the appellant.

Brady and Ring, for the appellee.

GAINES, A. J. Appellee, while walking along the track of a railroad in the city of Houston, upon which the appellant ran its trains, had his foot caught between the rails of the switch, and run over by a train of the company. The accident resulted in the loss of his foot. He was but a boy at the time of injury, and brought suit by his father as his next friend, and obtained a verdict and judgment against the appellant for two thousand dollars.

The deposition of three witnesses residing in Davenport, Iowa, were taken on behalf of plaintiff, who testified that a certain device consisting of a block of wood fastened between the rails at the frogs of the switches was in use upon certain railroads in the Northwest, and had been so used for four or five years; that it prevented the danger to persons employed upon or walking over the track of catching a foot in the switch; and that without some similar contrivance, the switches were not safe. To the reading of this testimony the defendant objected, but the objection was overruled by the court. The objections were, in substance, that the answers of the witnesses

showed only that the appliance had been used upon a few railroads in a distant part of the country, and was not competent to prove that its use was so long and so generally established as to make it the duty of the defendant company to adopt and use it upon its road in Texas. We do not think the objection well taken. It is true that it is not the duty of a railroad company to discard reasonably safe machinery, and to adopt a new device for the safety of its employees, until, by its general continued use, or otherwise, its superiority has been established. The evidence in this case shows that the frog of the switch, without some guard of this character, was dangerous to brakemen, and though to a lesser degree, also to pedestrians passing over the track.

The testimony objected to tended very strongly to prove, not only that an unblocked switch was unsafe, but also that there was a simple, cheap, and effectual device by which danger of accidents from this source might be avoided. It also appeared from other evidence in the case that at the place where the accident occurred there were no sidewalks, and that the street was practically taken up with railroad tracks. The public had the right to use the street to pass over it, either on foot or with vehicles, notwithstanding the right of way granted to the railroad company: *Baltimore etc. R. R. Co. v. Fitzpatrick*, 35 Md. 32. There being evidence calculated to prove that the switches were dangerous to persons who had the right to pass along or over the street, the testimony under consideration was admissible, as tending to show that there was a simple appliance which would have remedied the defect. We therefore think the court did not err in admitting it.

During the progress of the trial, the counsel for the defendant asked the court to give the following instruction: "The jury are instructed that railroad corporations are not required to discard their machinery and appliances for operating their trains in order to introduce new inventions, which are supposed to be improvements on the old appliances in use, but which are not in general use; and you are further charged that railroad companies are not, any more than individuals, bound to use the highest degree of care to avoid injuring one who may possibly trespass upon its property, but, as to such persons, are only required 'to use ordinary care.'" This was refused by the court, and its refusal is assigned as error. But in our opinion the assignment is not well taken. We think that both the propositions contained in the charge was calcu-

lated to mislead the jury. The evidence did not present a question of the propriety of discarding the old machinery for new, but of the propriety and practicability of providing against a known danger by the addition of a simple device to appliances already in use. The first proposition may have led the jury to conclude that in the opinion of the court there was something to be discarded, and was not applicable to the evidence, and therefore improper. The second proposition in the instruction was calculated to induce the jury to consider the plaintiff as a trespasser upon the track of the company. He had the right to pass along the street, especially in a case like this, where there was no sidewalk, although the streets were occupied by the railroad track, and although it was his duty to get out of the way of a passing train; and therefore he was not in any sense a trespasser. The charge being calculated to mislead the jury, it was not error to refuse it.

What we have already said is sufficient to dispose of the fourth assignment of error. It complains of the refusal of the court to give a special charge, which would have directly instructed the jury that if plaintiff went upon the track of the railroad he was a trespasser, and that the company was under no obligation to construct its track with reference to the safety of such trespassers. Such an instruction, as applicable to the case made, was clearly erroneous, and was properly refused.

Appellant's fifth assignment is, that the court erred in charging the jury as follows: "That the primary purpose and design of a public street in a city is for vehicles and persons to pass over and travel upon, and the use of such street for railroad tracks and trains thereon, when permitted, is to a certain extent, and in a limited sense, subservient to the original design of such streets for travel over and upon them. In this case it is admitted that defendant company had the right to use the track, and that the Texas and New Orleans Railway Company owned the track, and has the right to use the street at the place where the accident occurred. A railroad company using a public street in a city for its track and trains thereon should use all the care and precaution that it reasonably could and should to prevent accidents to any and all persons using such streets, and the nature and extent of danger from neglect should be taken into account by the jury in arriving to a proper conclusion as to whether or not the facts in evidence show such neglect of duty on defendant's part."

The first objection to this instruction is, that it does not de-

fine what the court means by the words "to a certain extent, and in a limited sense." But we think no such definition necessary. There is nothing in this, when considered in the light of the whole charge, to lead the jury to infer that the company did not have the right to run their trains over the track at all times. They may have inferred that this right was limited by the duty of exercising reasonable care in keeping in order their track and operating their trains so as to prevent injuries to persons who also had the right to use the streets in passing from one point in the city to another. The charge intimates no other limitation upon the right of the defendant company to the use of its track along the street, and the jury could not have been misled into supposing that any other was meant. The further ground of objection to this charge is, that it did not properly state the law as to the degree of care required of the defendant company. The instruction, in effect, tells the jury that the defendant was bound to exercise reasonable care to prevent danger to persons lawfully using the streets. In a leading case, this language is used: "It is correctly said that generally, between persons standing in no particular relation to each other, that alone is reasonable care which, in the judgment of men in general, is proportioned to the probability of injury to others, and consequently he who does what is more than ordinarily dangerous is bound to use more than ordinary care": *Morgan v. Cox*, 22 Mo. 373; 66 Am. Dec. 623. This defendant in this case was bound to use a degree of caution corresponding to the danger of operating its trains over the street of a city where, by reason of the absence of sidewalks, persons might be expected to walk along and across the tracks. This was reasonable care, and therefore the charge was not erroneous.

Another portion of the charge is also complained of in the sixth assignment of error. The court there uses this language: "If you find that either the owner of the track or trains using it, in the exercise of care, prudence, and foresight, should have had the track protected so as to avoid danger therefrom"; and it is contended that, by the use of the word "foresight," the court imposed upon the defendant a degree of care much greater than the law requires. But we think, in the connection in which it was used, the term was synonymous with "prudence," and added nothing to the meaning of that word. The word "foresight" might very properly have been

omitted; but we do not see that the jury could have been misled by its use.

Neither do we find any error in that part of the charge set out in appellant's seventh assignment. It instructs the jury, in effect, to find for the defendant if the track was safe, and if the engineer was not negligent in failing to ring his bell or to blow the whistle, or in failing to keep a proper lookout, and if, after discovering plaintiff upon the track, he did everything in his power to stop the train. This was correct. If there was a failure on the part of the company or its engineer in either particular so mentioned, and this failure was the cause of the injury, then the verdict should have been for the plaintiff. In another portion of the charge, the jury were told that plaintiff could not recover, if, by his own negligence, he contributed to the injury. This disposes of the assignments presented in the appellant's brief, and we find no error in the rulings or charge of the court. The judgment is therefore affirmed.

RAILROAD COMPANY IS ANSWERABLE TO ONE WHO BECOMES FASTENED ON ITS TRACK in the streets of a city because of negligence in the construction of such track, and who, while so fastened, is injured by an approaching train, though the employees did not see him, nor know of his helpless condition: *Louisville etc. R. R. Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155, and note 163.

RAILROAD COMPANY IS NOT BOUND TO CHANGE ITS MACHINERY in order to apply every new invention or supposed improvement in appliances: *Wonder v. Baltimore etc. R. R. Co.*, 32 Md. 411; 3 Am. Rep. 143; *Huhn v. Railroad Co.*, 92 Mo. 440; but it is bound to exercise reasonable and ordinary care in providing such suitable and safe appliances as common experience shows to be proper: *Towns v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 630; 55 Am. Rep. 508.

GREATER CARE IS REQUIRED OF RAILROAD COMPANY than is otherwise necessary in running its trains in a populous town: *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521, and note 529.

CONTRIBUTORY NEGLIGENCE. — Of an infant of tender years less discretion is required than of an adult, and the degree depends upon his age and apparent knowledge: *Railroad Co. v. Whipple*, 39 Kan. 531; *McCarthy v. Railway Co.*, 92 Mo. 536.

MILLER v. KOERTGE.

[70 TEXAS, 162.]

FRAUDULENT CONVEYANCES. — A FRAUDULENT GRANTEE IS SUBSTITUTED TO THE RIGHTS of his grantor in the property conveyed, which is subject only to the latter's creditors, and it is the right of the fraudulent grantee to demand that such creditors shall pursue strictly the procedure provided by law for the enforcement of their claims.

EXECUTIONS. — WHERE PROPERTY FRAUDULENTLY CONVEYED IS SOLD UNDER EXECUTION against the grantor for a grossly inadequate consideration, by reason of irregularities in the proceedings, the fraudulent grantee can, by a proper procedure, have the sale set aside. He has a right subordinate only to the claim of the creditors, and this right is not placed beyond the pale of legal protection because of his participation in a fraud.

EVIDENCE SHOWING THAT ABSTRACT OF JUDGMENT UNDER WHICH PARTY CLAIMS HAD BEEN RECORDED does not raise a presumption that the abstract was properly noted in the index. The legal inference is, that the claimant would have proved the indexing of the abstract if an index had in fact been made.

EXECUTIONS. — FRAUDULENT GRANTEE OF LAND CANNOT PROCURE a sale of it under execution against his grantor to be set aside for gross inadequacy of price, if it appears that the low price bid for the property was caused by the recording of the fraudulent conveyance to the grantee.

IN ORDER TO SET ASIDE A SHERIFF'S SALE FOR MERE IRREGULARITY and inadequacy of consideration, a direct proceeding should be instituted for that purpose in the court from which the execution issued, and the plaintiff in execution, as well as the purchaser, should be made a party.

Jones and Garnett, for the appellant.

W. P. Hamblen, for the appellees.

GAINES, A. J. At a sheriff's sale, made by virtue of an execution in favor of the state of Texas against Charles Koertge, the appellant, Miller, became the purchaser of the lands in controversy in this suit. The sale was made on the first Tuesday in March, 1885. The title to the lands was originally in Charles Koertge, but Herman Koertge, his son, claimed to have purchased them for a valuable consideration before the sale and before the levy of the execution. Appellant having obtained a judgment in a suit of forcible entry and unlawful detainer, the other parties to which are not shown by the record, Herman Koertge brought this action to enjoin a writ of possession on that judgment. Herman died, his widow and heirs made themselves parties plaintiff, and in an amended petition alleged his purchase of the land from his father before the levy of the execution; that the conveyance was made in good faith and for a valuable consideration; and also that the price bid by Miller at the sheriff's sale was grossly inadequate, and

that this was brought about by irregularities in making the levy and in advertising the sale. They offered to pay Miller ninety-one dollars, the aggregate amounts of his bids, and asked that the sale be set aside, and to be quieted in their title and possession of the lands. Miller answered, setting up title by virtue of the sheriff's sale, and alleged that the conveyance from Charles Koertge to Herman Koertge was made with the intent to defraud the creditors of the former; that it was not in fact executed until the levy of the execution under which he purchased, and also that an abstract of the judgment upon which the execution issued had been filed in the county clerk's office long before the date of the deed under which Herman Koertge claimed, and was, therefore, a prior lien upon the lands.

The deed from Charles to Herman Koertge bore date December 1, 1883, but was not acknowledged and recorded until the 27th of February, 1885. It purported to be for the consideration paid of \$475. The execution under which appellant claimed was levied on the 9th of February, 1885. Charles Koertge testified that his conveyance to his son was *bona fide*, and not for the purpose of defrauding his creditors. There was evidence, however, tending to show that it was fraudulent as to creditors, and also that in fact it was executed after it bore date, and after the levy of the execution. There was also evidence going to show that the sheriff never made any demand upon Charles Koertge for a levy, and that the sale under the execution was not advertised for twenty days. Upon these points, however, there was also conflict. The value of the property, as sworn to by the witnesses, varied from about two hundred and fifty to fifteen hundred dollars. The weight of the testimony seems to be, that the value was largely in excess of the bids of the appellant.

Such being the issues and evidence, the court, among other instructions, charged the jury as follows: "If you are satisfied, from the evidence, that plaintiffs are the widow and children of Herman Koertge, and that at the time of his death he held the title to the land sued for, they are entitled to recover it, unless you find from the evidence that the deed to him was made to hinder, delay, and defraud the creditors of Charles Koertge, and that fact was known to Herman Koertge, or that he had such knowledge of the facts, — if such was Charles Koertge's purpose, — that he would and should, in the exercise

of due and ordinary care, have known thereof; and if you so find, your verdict should be for defendant, Miller, unless, from all the evidence before you, you further find that there are such irregularities or informalities in the sheriff's sale as would prevent the property from selling at a fair value; and in this connection you are instructed that mere inadequacy of consideration is no defense to a sheriff's sale and deed, but if there is such great disparity of the price bid and paid and the reasonable, fair value of the land sold as would shock the sense of all mankind, then but slight circumstances will suffice to vacate such sheriff's sale and deed." This charge is the ground of the first assignment of error. The most important question presented by the assignment is, whether or not a fraudulent grantee, when the property is sold under execution against his grantor, can take advantage of irregularities resulting in gross inadequacy of price, in order to set aside the sale. Upon the point there are no authorities cited in the briefs of counsel, and we have not succeeded in finding a case in which the question has been determined.

In *Pearson v. Hudson*, 52 Tex. 352, the grantor had conveyed property in trust for his children, which was at the time subject to the lien of a judgment against him, and the property having been sold by virtue of an execution issued on the judgment, the grantees were permitted to set up the inadequacy of price growing out of irregularities in the levy, and to have the sale avoided. But in that case the court below found that the conveyance to the trustee was not fraudulent, and the finding was approved by the supreme court. What would have been the ruling if the conveyance had been fraudulent, the opinion does not intimate. Being without authority, we must resort to general principles. The language of the statute in reference to fraudulent conveyances is, that such conveyances "shall as to such creditors . . . be void." But it is universally held that by this is not meant that the conveyance is absolutely void,—that is to say, null to all intents and purposes as to the persons attempted to be defrauded,—but that it is subject to be avoided by a creditor, proceeding according to the due course of law. For example, he cannot act upon the theory that, as to him, the conveyance is absolutely void, and take a deed from his debtor: *Judge v. Vogel*, 38 Mich. 569; *Fox v. Willis*, 1 Id. 321; *Grimsley v. Hooker*, 3 Jones Eq. 4; *Jones v. Rahilly*, 16 Minn. 320; *Tate v. Liggat*, 2 Leigh, 84.

If he proceed by attachment, and seize personal property, alleged to have been fraudulently transferred by his debtor, and his debtor sue for the trespass in order to justify, not only must the attachment be produced, but it must be shown that he is a creditor of the fraudulent vendor, and that he took the necessary preliminary steps which authorize the issuance of the writ: *Thornburgh v. Hand*, 7 Cal. 554; *Noble v. Holmes*, 5 Hill, 194; *Damon v. Bryant*, 19 Mass. 411; *Sanford Mfg. Co. v. Wiggin*, 14 N. H. 441; 40 Am. Dec. 198.

These instances are sufficient to illustrate the principle that the creditor is strictly limited to the right to subject the property fraudulently conveyed to the payment of his debt by the regular course of judicial prudence. He is certainly not entitled to any surplus that may remain after the satisfaction of his debts, nor is the fraudulent grantor; for as between him and the grantor the conveyance is good. In *Zuver v. Clark*, 104 Pa. St. 222, the supreme court of Pennsylvania say: "Should a surplus remain after paying the debts, it would belong to the grantee, for the grantee's title only fails so far as it stands in the way of the creditors." It follows from the principles announced that, in our opinion, the fraudulent grantee is substituted to the rights of his grantor in the property conveyed, and that it is subject only to the claims of the latter's creditors, and that it is his right to demand that they shall pursue strictly the procedure provided by law for the enforcement of their claims. If by reason of irregularities in the proceeding the property be sacrificed,—that is, sold for a grossly inadequate consideration,—by a proper procedure he can have the sale set aside. He has a right subordinate only to the claim of the creditors, and no court, so far as we are advised, has gone to the extent of holding that because of his participation in a fraud this right is placed beyond the pale of legal protection. The case last cited holds that he may show that the sale is void, and defeat a recovery of the property, and we think he should be permitted upon similar grounds to set aside a voidable sale when necessary to preserve a surplus which might remain from a sale legally and regularly made.

We conclude that the court did not err in submitting the questions of irregularity and consequent inadequacy of consideration to the jury; but we think the charge should have gone further, and instructed them what was meant by irregularities in the sale.

Appellant introduced evidence showing that an abstract of the judgment under which he claimed had been recorded before the date of the deed from Charles to Herman Koertge; but did not show that it had ever been indexed as the law requires. He now complains that the court erred in instructing the jury that the judgment was not a lien upon the land from the time of recording the abstract, and bases his assignment upon the proposition that in the absence of proof to the contrary the presumption is, that the clerk did his duty, and properly noted the abstract in the index. But the index, being matter of record, could have been readily proved if it existed. In such a case remote presumptions are not to be indulged. The legal inference is, that the appellant would have proved the indexing of the abstract if an index had in fact been made.

The fifth assignment of error is, that "the court erred in refusing to give the charge asked by this defendant, to the effect that if the alleged inadequacy of price bid and paid by Miller for the property was occasioned by the fact that Herman Koertge, by putting on record the deed for the property from Carl Koertge to him, thereby caused said property to bring an inadequate price at the sheriff's sale, then his heirs in this suit could not be heard, or allowed to take advantage of such inadequacy of price to set aside said sale, and erred in failing to give any equivalent charge."

This assignment is well taken. The deed from Charles Koertge to Herman Koertge, being upon record, was well calculated to depress the price of the property, and to cause it to sell for a song. If this deed was fraudulent, and if it was in fact the cause of the low price at which the property was sold, the sale should not have been set aside for inadequacy of consideration. This is expressly decided in the case of *Daniel v. McHenry*, 4 Bush, 277.

The other questions presented in the brief of appellant are not likely to arise upon another trial, and need not be determined. But we consider it proper to say that, in our opinion, in order to set aside a sheriff's sale for mere irregularity and inadequacy of consideration, a direct proceeding should be instituted for that purpose, in the court from which the execution issued, and the plaintiff in execution, as well as the purchaser, should be made a party. The plaintiff in execution is liable to have to refund the money received from the sale, and has an interest in the result of the suit. The point was

not made in the lower court, and we do not here decide it. The plaintiffs in this suit tender the bid to the purchaser, and this may relieve them of the necessity of making the state a party.

For the errors pointed out, the judgment is reversed, and the cause remanded.

ONE WHO EXECUTES DEED TO DEFRAUD CREDITORS is estopped as to his grantee: *Peterson v. Brown*, 17 Nev. 172; 45 Am. Rep. 437; and see *Bush v. Rogan*, 65 Ga. 320; 39 Am. Rep. 785; *Davis v. Swanson*, 54 Ala. 277; 25 Am. Rep. 678; *Lawton v. Gordon*, 34 Cal. 36; 91 Am. Dec. 670.

EXECUTION CREDITOR IS BOUND by the same rules of honesty as any other vendor, as regards the sale made under execution: *Bartholomew v. Warner*, 32 Conn. 98; 85 Am. Dec. 251.

INADEQUACY OF CONSIDERATION as ground for annulling execution sale: *Chamblee v. Tarbox*, 27 Tex. 139; 84 Am. Dec. 614, and note 619; *Campan v. Godfrey*, 18 Mich. 27; 100 Am. Dec. 133; *Carden v. Lane*, 48 Ark. 228; 3 Am. St. Rep. 228. Mere inadequacy of price is not ground upon which to set aside an execution sale: *Sams v. Sams*, 85 Ky. 396; see *Scoggin v. Schloath*, 15 Or. 380.

PARTIES TO PROCEEDING to set aside execution sale: *Stone v. Day*, 69 Tex. 13; 5 Am. St. Rep. 17.

SEALE v. BAKER.

[70 TEXAS, 283.]

BANKS AND BANKING. — THE DIRECTORS OF A BANK ARE PERSONALLY LIABLE, at the suit of a depositor, for damages sustained by reason of the insolvency of the corporation, when the depositor is induced to place money in the bank solely by false representations of solvency made to the general public by the directors, who ought to have known, and, by the use of ordinary care, such as it was their duty to have exercised, might have known, that such representations were false, and they are so liable whether such representations were made with the intent to defraud or not.

ACTION for the recovery of damages sustained by reason of the false representations of the defendants as directors of a bank. The facts appear in the opinion.

Scott and Levi, for the appellant.

Hutcheson, Carrington, and Sears, Goldthwaite and Ewing, and Baker, Botts, and Baker, for the appellees.

ACKER, J. The court below sustained general demurrers to the petition, and dismissed the suit, from which judgment this appeal is taken. It now devolves on us to determine whether

or not, on the case stated in the petition, appellant is entitled to recover.

It is alleged in the petition that on the nineteenth day of December, 1885, and for one year preceding that date, appellees were directors of the banking corporation, the City Bank of Houston, actively directing and controlling its affairs and the conduct of its said business, and representing themselves and were generally and publicly known as such, and well knew and ought to have known, and by the use of ordinary care, and of such as it was their duty to have exercised, might have known, all and singular the particulars and conditions of said corporation in respect to the matters hereinafter mentioned, at the time when they severally transpired and took place.

That during the period aforesaid the said defendants, who were all well and publicly known as possessed of remarkable business capacity, carried on the business of said bank, and held it out to the public as of undoubted financial ability, and deserving of public confidence, and daily and continuously caused to be published, by their authority and direction, in the interest and behalf of said bank, advertisements in the Houston Daily Post, a daily newspaper and journal of general and wide circulation throughout the state of Texas, and elsewhere, published in said city of Houston, and in city directory of the city of Houston, a printed book of reference in general public use, and upon conspicuous sign-boards kept and exposed to the public at and near the door of the place of business of said bank, and upon printed letter-heads, upon and with which the business correspondence of said bank was conducted, and so generally circulated among all persons, including this plaintiff, having any transactions or correspondence with said bank, advertisements, statements, and representations to the effect and in substance that the said bank had a capital of five hundred thousand dollars, was in sound financial condition, fully solvent, and wholly reliable, and well deserving of public trust and confidence; that in truth and in fact the said advertisements, statements, and representations so caused to be published by said defendants were, at the time they were severally so published, wholly false and untrue, and the said bank, at the said time, did not have a capital of five hundred thousand dollars, and was not in sound financial condition, nor solvent, nor reliable, nor in any manner or wise deserving of public trust and confidence, but, on

the contrary, had long before lost all of its capital, and a greater portion of its funds and assets which had come into its hands from its creditors, depositors, and customers, and was and long had been hopelessly and irretrievably insolvent; for several years its current expenses had exceeded its earnings; its affairs had been and continued thereafter growing daily worse; it had been and then was and thereafter continued doing business upon a wholly fictitious credit, and from and after September 20, 1885, if not before that time, all reasonable hope and prospect of retrieving its solvency was utterly gone, and it was a mere question of a very short time when the true condition of said bank would necessarily become notorious, and it would be compelled to suspend business, to the great loss of its creditors and customers; and in the exercise of good faith and justice to the public, its business should have been suspended and wound up long before the eighth day of December, 1885.

That plaintiff read and believed said advertisements, statements, and representations, and relying thereon and induced thereby, and not otherwise, he did, on the eighth day of December, 1885, place in said bank for collection, and to be placed to his credit, a draft for two thousand five hundred dollars, which was collected by said bank, and the proceeds placed to his credit therein as a customer of said bank; that on the nineteenth day of December said bank closed its doors and suspended business, in a wholly insolvent condition, whereby plaintiff has sustained damage.

It is also alleged that said "false advertisements, statements, and representations were caused to be published by said defendants with intent to deceive, and they did deceive, the public and plaintiff as to the true condition of said bank, and to induce the public and plaintiff to confide in and extend credit to and make deposits in said bank." It is further alleged that said advertisements, statements, and representations were published as aforesaid in pursuance of a common design on the part of said defendants, in which they all joined, to give said bank a fictitious credit, wholly unwarranted in fact, and to induce thereby the public and this plaintiff to extend credit to and to make and to keep deposits in said bank, and that from and after the twentieth day of September, 1885, the said defendants had no hope, in reason or in fact, of restoring said bank to solvency, or of in any wise improving its condition, and its further continuance in busi-

ness was by them designed and effected merely for the purpose of enabling certain of said directors to save themselves in respect of transactions with said bank upon which they claimed said bank was liable, directly or indirectly, to them; and this at the expense and sacrifice of such persons as might happen to have funds in said bank when such design should be accomplished; and all the deposits received and credits contracted by said bank from the said twentieth day of September, 1885, until its suspension, were received and contracted without any prospect of making good or paying such liabilities, except partially only, and in so far as they might happen to be withdrawn and demanded in current transactions before the purpose aforesaid of continuing said business should be accomplished.

That the transactions aforesaid, which were designed to be protected and secured by the further continuance of the business of said bank, consisted of pretended loans of money and accommodation paper by the said William R. Baker and Robert Brewster, and S. K. McIlhenny and by the McIlhenny Company, a corporation, whereof the said S. K. McIlhenny was and still is the president, manager, and principal stockholder.

For the purpose of promoting conciseness and simplicity, we formulate the questions involved in this appeal, as follows:—

1. Are the directors of a banking corporation personally liable at the suit of an individual depositor for damages sustained by reason of the insolvency of the corporation, when the depositor is induced to place money in the hands of the corporation solely by representations of solvency made to the general public by the directors, who ought to have known, and by the use of ordinary care, such as it was their duty to have exercised, might have known, that such representations were false?

2. Are such directors so liable to such depositors when such false representations are knowingly made with intent to defraud the public generally?

3. Are such directors so liable when such false representations are made in pursuance of a fraudulent combination and common design upon their part to give to the corporation a fictitious credit that the business might be continued for the purpose of enabling such directors to collect certain pretended loans claimed to have been made by them to the corporation?

If either of these questions is answered in the affirmative, it follows that the court erred in sustaining the demurrers, and the judgment must be reversed.

After a more than ordinarily careful investigation, we conclude that each and all of them must be answered affirmatively, which dispenses with the necessity for a separate discussion of each; for if appellees are liable under the circumstances stated in the first, *a fortiori* they are liable under the circumstances stated in the second and third of these questions.

Directors of banking corporations occupy one of the most important and responsible of all business relations to the general public. By accepting the position and holding themselves out to the public as such, they assume that they will supervise and give direction to the affairs of the corporation, and impliedly contract with those who deal with it that its affairs shall be conducted with prudence and good faith. They have important duties to perform toward its creditors, customers, and stockholders, all of whom have the right to expect that these duties will be performed with diligence and fidelity, and that the capital of the corporation will thus be protected against misappropriation and diversion from the legitimate purposes of the corporation. Customers are invited to business relations, and are induced to accept and act upon such invitation by the representations that the institution is solvent and owns a certain amount of capital, and that this capital is under the supervision and control of certain directors. It is the duty of directors to know the condition of the corporation whose affairs they voluntarily assume to control, and they are presumed to know that which it is their duty to know, and which they have the means of knowing.

If the representations are false, but relied and acted on by a customer to his damage, to hold that in such case the directors who made such false representations are not liable, because they were ignorant of the falsity of such representations, would be to award a premium for negligence in the performance of important and almost sacred duties voluntarily assumed, and to license fraud and deception of the most flagrant and pernicious character. It is a familiar principle of law that an action for damages lies against a party for making false and fraudulent representation whereby another is induced to do an act from which he sustains damage. If the representations are untrue, it is immaterial that they may

have been made without fraudulent intent, and it is sufficient that they were made to the general public, if the appellant was induced thereby to deposit money in the bank. We think it can make no difference as to the liability of appellees that they made the representations as directors of the corporation.

We proceed now to notice some of the authorities which we think support our conclusions. Bigelow, in his work on estoppel, page 538, after reviewing many authorities, states the rule as follows: "In accordance with the principles in these cases, it is held that directors of corporations, being bound to know the proceedings of the body, cannot escape the effect of representations made by them concerning the acts of the corporation by the allegation of ignorance." In Field on Corporations, sections 170 to 174, inclusive, it is said: "Where the directors of an insurance company had fraudulently caused false statements to be officially made as to the condition of the company, it was held that they were personally liable to a party who had suffered damage thereby." The directors are generally only bound in the management of the affairs of the corporation to use reasonable diligence and prudence,—that is, to such diligence and prudence as men usually exercise in the management of their own affairs of a similar nature, and if they act in good faith they are not personally responsible to stockholders for a loss that may be sustained thereby. But a director may be liable in damages for his fraudulent act. And it has been held that a director is personally responsible, not only for fraud and willful neglect, but also for his negligence, especially gross negligence.

It will be apparent from what has been said that the relation not only of principal and agent exists between the corporation and the director, but also the relation of trustee and *cestui que trust* exists between them and the stockholders and creditors. Accordingly, they have no right to enter into or participate in any combination, the object of which is to divest the company of its property and obtain it for themselves, to the prejudice of members or creditors. Nor are they entitled to any share of capital stock or any dividends of profits until its creditors are paid. This doctrine would of course be applicable in all cases of fraudulent or wrongful disposition of the corporate funds or property by directors. For as agents and trustees of the corporation, as well as the stockholders and creditors, they would be bound to perform their duties and administer the trust in good faith.

The fiduciary character of directors referred to is such that the law will not permit them to manage the affairs of the corporation for their personal and private advantage, when their duty would require them to work for and use reasonable efforts for the general interest of the corporation and its stockholders and creditors. The confidence thus reposed in them cannot be thus abused with impunity; and they cannot use their position to promote their own interest in respect to anything thus intrusted to them, to the prejudice of creditors or other members.

In *Morse on Banks and Banking*, 131 et seq., it is said: "Whatever knowledge a director has or ought to have officially, he has, or will be conclusively presumed at law to have, as a private individual. Thus a director is affected with notice of the condition and transactions of the bank. If the bank is insolvent, or if it offers him for purchase notes which could only be legally sold by authority of a directional vote which has not been given, he is affected with knowledge of the insolvency, and of the illegality of the notes": *Lyman v. Bank of U. S.*, 12 How. 225.

The same author, page 133, says: "If bank directors do not manage the affairs and business of the bank according to the directions of the charter and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either stockholders or creditors, or both. They may be held to account to an injured party in a court of chancery, or they or any one of their number who shared in the wrongdoing may be sued at law for damages."

In 3 *Sutherland on Damages*, pages 587 and 588, it is said: "If the persons making the representations which are material, and which he intends shall influence another, knows them to be false, the case is clear. Some question has been raised whether positive representations made without knowledge, and believed to be true by the party making them, will sustain an action for damages in the nature of deceit. But the doctrine which seems supported by the great weight of authority is, that if a person states as of his own knowledge material facts which are susceptible of knowledge, to one who relies and acts upon them as true, it is no defense, if the representations are false, to an action for deceit, that the person making them believed them to be true. The falsity and fraud consist in representing that he knows the facts to be true of his own knowledge, when he has not such knowledge. It is not neces-

sary that the false representations be made to deceive the plaintiff in particular."

In 3 Wait's Actions and Defenses, 436, it is said: "It has been laid down as settled law that if a party makes representations in such a manner as to impart a knowledge in him of facts, whilst in fact he has no knowledge of the facts, and the representations are made with the intent that another shall rely on them, and those representations turn out to be false, it is as much a fraud as if the party making them knew them to be untrue." See also Kerr on Fraud and Mistake, 111, 324, 325.

In *Gillett v. Phillips*, 13 N. Y. 117, it is said: "By accepting the office of director, he assumed a duty to the stockholders and creditors of the bank to inform himself of what would appear by an inspection of the books of the institution of which he was one of the ostensible managers, and he cannot urge a want of notice arising from a neglect of duty."

The case of *Morse v. Swits*, decided by the supreme court of New York, reported in 19 Howard's Practice Reports, 286, was an action by a stockholder against the directors of a bank to recover of them, personally, damages for a false statement published concerning the affairs of the bank, by which the plaintiff was induced to purchase stock of the bank. Gould, J., delivering the opinion of the court, says: "I think the tendency of all the later decisions in this country and in England is in favor of extending the liability of every one who makes a public representation which he knows to be false, and upon faith in which any one has been led into a business transaction whereby he suffers damage. I do not understand that it is at all necessary to the right of action that the representations should have been intended for the party sustaining the loss, or in any way addressed to him. If it be made openly and publicly, so that it might well come to his ears, and he acts upon it, the party making it shall answer to him for his damages. He shall not be at liberty to sow falsehood broadcast without being responsible for the loss it causes. The falsehoods may have been made for one purpose and published for that, but, being published, the public or any individual of the public has the right to believe it. It must have been the intention of the persons publishing it that it should be believed. **And if, believing it, any one of the public acts on that belief, the makers and publishers of the falsehoods are to be held liable for the consequences they have caused**": See authorities cited in note at end of this decision, on page 288.

The case of *United Society etc. v. Underwood*, 9 Bush, 617, 15 Am. Rep. 731, was an action against the directors of a bank to recover of them, personally, damages for loss of deposits wrongfully converted, and it is there said: "The question here presented is, whether the directory, who had knowledge of these alleged wrongful sales, can be held to answer personally for the deposits so converted. Appellees insist that they cannot be so held, because of want of privity between the depositors and themselves. They concede that for gross negligence or mismanagement upon their part, resulting in loss to the bank, they may be held to account to it, but urge that inasmuch as their undertaking was to the corporation, they can be proceeded against by it alone, and that appellants must look to the bank, and not to them. This position is plausible, but it cannot, in our opinion, be maintained. Bank directors are not mere agents, like cashiers, tellers, and clerks. They are trustees for the stockholders, and as to their dealings with the bank, they not only act for it and in its name, but, in a qualified sense, are the bank itself. It is the duty of the board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community have the right to assume that the directory does its duty, and to hold them personally liable for neglecting it. Their contract is not alone with the bank. They invite the public to deal with the corporation, and when any one accepts their invitation he has the right to expect reasonable diligence and good faith at their hands; and if they fail in either, they violate a duty they owe, not only to the stockholders, but to the creditors and patrons of the corporation."

The case of *Bartholomew v. Bentley*, 15 Ohio, 666, 45 Am. Dec. 596, was a suit by an individual creditor of an insolvent bank against the officers of the bank to make them personally liable for losses sustained by the plaintiff by reason of his relying and acting upon false representations made by the defendants. It is there said: "It may be regarded as a well-settled principle that for every fraud or deceit which results in consequential damage to a party he may maintain a special action on the case. The principle is one of natural justice long recognized in law. And it matters not, so far as the right of action is concerned, whether the means of accomplishing the deception be complex or simple,—a deep-laid scheme of swindling, or a direct falsehood, a combined effort of a number

of associates, or the sole effort of a solitary individual,—provided the deception be effected and the damage complained of be the consequence of the deception. A valid act of incorporation, or an invalid and pretended right to exercise corporate franchises, is alike powerless to secure the guilty from the consequences of their fraudulent conduct, where it has been knowingly resorted to as the mere means of chicanery and imposition, and used to facilitate the work of deception and injury. Were it otherwise, it would be a reproach to the law. If the defendants, with the design to defraud the public generally, have knowingly combined together and held forth false and deceptive colors, and done acts which were wrong, and have thereby injured the plaintiff, they must make him whole by responding to the full extent of that injury, and they cannot place between him and justice, with any success, the character of the bank, whether it be valid or void, forfeited or *in esse*. . . . Nor is it material that there should have been an intention to defraud the plaintiff in particular. If there was a general design to defraud all such as could be defrauded by taking their paper issues, it is sufficient, and the plaintiff may maintain his suit provided he has taken the paper, and suffers from the fraud. . . . It is first said that to allow bill-holders who have been defrauded to sue the members of the company individually at law will produce endless litigation, and when applied the remedy cannot by possibility do equal justice to all the creditors, or to the members of the company. It may be that numerous suits will be prosecuted. . . . And yet the doctrine that because they have cheated thousands they are safer than they would be if only one man had suffered, does not obtain in courts of justice. Again, it is said the fund sought is a trust fund, and a bill in chancery is the proper remedy. There would be much propriety in the position, were it in point of fact true that a party who has been defrauded by the act of another has no redress save out of a fund composed solely of the proceeds of the imposition. In that case strict equity might require that all those whose injuries had been the source of the fund should share equitably in it. But the rule that a person sustaining damage by fraudulent acts of another can only look to a particular fund of the wrong-doer for redress never existed anywhere.”

The cases of *Cross v. Sackett* and *Word v. Sackett*, 2 Bosw. 645, were actions brought by purchasers of stock of a corporation to recover of directors money paid for the stock, upon the ground of false representations made by the directors in a

prospectus and other advertisements as to the value of the stock. In these cases it was held that the actions could be maintained, and that "there is no wrong or fraud which the directors of a joint-stock company, incorporated or otherwise, can commit which cannot be redressed by appropriate and adequate remedies." The case of *Cazeaux v. Mali*, 25 Barb. 578, was an action brought by a stockholder of a corporation against the officials and directors to recover of them personally the loss sustained by plaintiff by depreciation in the value of stock, caused by the fraudulent issue of stock beyond the authorized amount. It was there held that the action was properly brought by the plaintiff in his own name, without joining the other stockholders,—the injury to each stockholder being separate and distinct from that sustained by the others,—and that the action was well brought against the defendants. The case of *Morgan v. Skiddy*, 62 N. Y. 325, was an action brought by a purchaser of stock of a corporation against the directors personally to recover the money paid for the stock, upon the ground that plaintiff had been induced to purchase the stock by false statements made in a prospectus issued by the defendants. It was there said: "If the plaintiff purchased the stock relying upon the truth of the prospectus, he has a right of action for deceit against the persons who, with knowledge of the fraud and with intent to deceive, put it in circulation. The representation was made to each person comprehended within the class of persons who were designed to be injured by the prospectus; and when a prospectus of this character has been issued, no other relation between the parties need be shown, except that created by the fraudulent and wrongful act of defendants in issuing or circulating the prospectus and the resulting injury to the plaintiff. It is hardly necessary to say that a director of a company who knowingly issues or sanctions the circulation of a false prospectus, containing untrue statements of material facts, the natural tendency of which is to mislead and deceive the community and to induce the public to purchase its stock, is responsible to those who are injured thereby. Mere exaggerated statements of the prospects of a new enterprise will not subject those who make them to liability; but no material misstatement or concealment of any material fact ought to be permitted. The directors of a company are supposed to know the facts touching its condition and property, and their statements in respect to its affairs naturally attract public confidence. If they

fraudulently unite in an attempt to deceive the public, and by false statements of facts to give credit and currency to its stock, it is but simple justice that they shall answer to those who have been deluded into giving confidence to them."

The case of *Shay v. Mabry*, 1 Lea, 319, was an action by a judgment creditor of a corporation against the directors to recover the amount of the judgment, upon the ground that the directors had misapplied or converted the assets of the company. It was then held that "directors of corporations are not mere figureheads; they are trustees for the company, for the stockholders, and for the creditors. They must not only use good faith, but also care, attention, and circumspection in the affairs of the company, and particularly in the safe-keeping and disbursement of funds committed to their custody and control. They must see that the funds are appropriated as intended to the purposes of the trust, and if they misappropriate them or allow others to divert them from these purposes, they must answer for it individually. Ignorance will not excuse when they have the means of knowledge."

The case of *Delano v. Case*, 17 Ill. App. 531, was an action by a general depositor against directors of a bank for permitting it to be held out to the public as solvent, when in fact it was at the time insolvent. It was there held that the directors were individually liable to the depositor. The judgment of the appellate court was affirmed by the supreme court in June, 1887.

The case of *Edyngton v. Fitzmaurice*, decided by the court of appeals of England in March, 1885, and published in the Central Law Journal of January 22, 1886, page 81, was an action by a purchaser of debentures of corporation against the directors to recover of them, personally, damages for false representations made in the prospectus inviting subscriptions for the debentures. It is there said: "This is what is called an action of deceit, the plaintiff alleging that statements were made by the defendants which were untrue, and that he had acted on the faith of these statements so as to incur damage for which the defendants are liable. In order to sustain such an action, the plaintiff must show that the defendants intended that the people should act on the statements, that the statements are untrue in fact, and that the defendants knew them to be untrue, or made them under such circumstances that the court must conclude that they were careless, whether they were true or not. The judgment against the directors, personally, was affirmed, all the judges concurring."

We might extend these quotations to much greater length, but deem it unnecessary to do so, as we think our conclusions are in accord with reason and the established principles of justice.

Forms of action do not obtain in our practice. All suits are actions on the case, and we think it can make no material difference in determining the questions here involved, whether the suit is called an action for deceit, an action to recover damages for the violation of a trust, or an action to recover damages for negligence in the performance of a duty. We have examined, with much care, all authorities cited by counsel for appellees in their able and exhaustive brief that are accessible to us, but none of them, we think, militate against the correctness of the conclusions expressed in this opinion. If this was a suit brought by the stockholders to recover damages resulting to the corporate property, many of appellees' authorities would apply, and we would hold, with those authorities, that appellant could not maintain the action for his individual benefit alone.

For the reasons stated, we are of the opinion that there is error in the judgment of the court below, and that it should be reversed, and the cause remanded.

LIABILITY OF DIRECTORS OF CORPORATION FOR MISREPRESENTATIONS OF ITS SOLVENCY. — The doctrine is asserted, that "when a fraud is committed in the name and under cover of a corporation by persons having the right to speak for it, for their personal gain and benefit, they are bound to answer personally for their wrongful acts. Their tongues uttered the false words, and their purses should pay the damages": *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 188, 195; *Bartholomew v. Bentley*, 15 Ohio, 659; 45 Am. Dec. 596; *Bank of Montreal v. Thayer*, 2 McCrary, 1. Thus, the directors of a corporation are supposed to know the facts touching its condition and property, and their statements in respect to its affairs naturally attract public confidence; and if they fraudulently unite in an attempt to deceive the public, and by false statements of facts to give credit and currency to its stock, they are justly liable to answer to those who have been deluded into giving confidence to them: *Morgan v. Skiddy*, 62 N. Y. 319, 326; and see *Westervelt v. Demarest*, 46 N. J. L. 37; 50 Am. Rep. 400. If, for instance, they knowingly issue or sanction the circulation of a prospectus containing false statements of material facts, the natural tendency of which is to deceive and to induce the public to purchase the corporate stock, they are liable for the damages sustained by one who, relying upon and induced by the statements, makes such a purchase, and this is held to be so although the false statements were not the sole inducement to the purchase: *Morgan v. Skiddy*, 62 N. Y. 319; *Paddock v. Fletcher*, 42 Vt. 389; *Peek v. Derry*, L. R. 37 Ch. Div. 541; 21 Am. & Eng. Corp. Cas. 243. So the officers of a corporation are liable to any person injured by their misconduct in issuing false certificates

of stock, and inducing their purchase by false and fraudulent representations as to the affairs of the corporation: *Bruff v. Mall*, 36 N. Y. 200. Nor is it material in such cases that there should have been an intention to defraud the plaintiff in particular. When the design is to defraud the public generally, any person who has suffered injury thereby may maintain his action: *Bartholomew v. Bentley*, 15 Ohio, 659; 45 Am. Dec. 596; *Eaton v. Avery*, 83 N. Y. 31; 38 Am. Rep. 389; *Commonwealth v. Harley*, 7 Met. 462; *Bank of Montreal v. Thayer*, 2 McCrary, 1. Compare *Schwenk v. Naylor*, 102 N. Y. 683.

Analogous to the above cases are those of misrepresentations made by the directors of a corporation as to its financial condition. And especially in the case of banking corporations, where great confidence is asked and reposed, and where dishonest dealings may cause widespread disaster, a rigid responsibility for good faith and honest dealing will be enforced: See *Anonymous*, 67 N. Y. 598; *Cragie v. Hadley*, 99 Id. 131; 52 Am. Rep. 9; *Chaffee v. Fort*, 2 Lans. 81; *Oakland Bank v. Wilcox*, 60 Cal. 126. And the doctrine of the principal case, that the directors of a bank are trustees for depositors as well as stockholders, and are bound to the observance of ordinary care and diligence, and incur liability for injuries resulting from their non-observance, is well sustained by authority: See *Delano v. Case*, 17 Ill. App. 531, 121 Ill. 247, 2 Am. St. Rep. 81, and other cases cited in the opinion to the principal case. Thus it is held that an action will lie by a depositor against the directors of a bank for negligence in allowing their bank to advertise and continue to do business, where the slightest examination of the bank's affairs by the directors would have disclosed the fact that the bank was utterly insolvent: *Delano v. Case*, 17 Ill. App. 531; 121 Ill. 247; 2 Am. St. Rep. 81. The decisions upon the subject are not, however, harmonious, and where an action for deceit was brought by a depositor against a director of a bank for false representations made as to the solvency of the bank, and the case turned upon the question whether it was necessary to show that the party making the representations knew at the time they were false, it was held that such knowledge was essential to sustain the action: *Cowley v. Smyth*, 46 N. J. L. 380; 50 Am. Rep. 432; to the same effect, *Zinn v. Mendel*, 9 W. Va. 580; and see *Hodges v. New England Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624, and note on the subject of liabilities of directors of corporations 637-651. So it was held that to sustain an action for fraud, founded upon representations made by a director of a corporation, in the form of public statements and reports as to its financial condition, it must be made to appear that he believed, or had reason to believe, at the time he made them, that the representations were false, or that, without knowledge, he assumed or intended to convey the impression that he had actual knowledge of their truth, and that the plaintiff relied upon them to his injury: *Wakeman v. Dalley*, 51 N. Y. 27; 10 Am. Rep. 551. See also *Cole v. Cassidy*, 138 Mass. 457; 52 Am. Rep. 284.

In a recent English case, which was an action of deceit against the directors of a corporation, founded upon misrepresentation in a prospectus, the result of the cases is thus summed up by Lopes, L. J.: If a person makes to another a material and definite statement of a fact which is false, intending that person to rely upon it, and he does rely upon it and is thereby damaged, the person making the statement is liable to make compensation to the person to whom it is made, — 1. If it is false to the knowledge of the person making it; 2. If it is untrue in fact, and not believed to be true by the person making it; 3. If it is untrue in fact, and is made recklessly, for instance, without any knowledge on the subject, and without taking the trouble to

ascertain if it is true or false; 4. If it is untrue in fact, but believed to be true, but without any reasonable grounds for such belief: *Peck v. Derry*, L. R. 37 Ch. Div. 541, 585; 21 Am. & Eng. Corp. Cas. 243. In this particular case the directors were held liable for the misstatement, as it was made without reasonable ground for their believing it to be true. And see *Smith v. Chadwick*, L. R. 20 Ch. Div. 27, 44.

WARD v. SUTOR.

[70 TEXAS, 343.]

MALICIOUS PROSECUTION. — ONE WHO MALICIOUSLY AND WITHOUT PROBABLE CAUSE PUTS INTO OPERATION the machinery of judicial proceedings which results in the arrest and trial of the accused, thereby incurs liability from which, when sued for malicious prosecution, he is not relieved by the fact that the subsequent proceedings in the prosecution so begun, and in a court having jurisdiction of the subject-matter, were so irregular that had a conviction resulted the judgment would have been a nullity.

IN SUIT FOR MALICIOUS PROSECUTION, THE FACT that the court before which the proceedings in the prosecution sued for were had had no jurisdiction to try the cause is not sufficient ground for excluding the transcript of the prosecution proceedings, when offered in evidence for the purpose of showing the affidavit, the criminal information based thereon, and the verdict of the jury in the case.

RECORDS. — CUSTODIAN OF JUDICIAL RECORDS, IN GIVING COPIES, need set them out only as the originals appear, and so certify. The failure to certify that an affidavit contained therein was made by the party who on the face of the copy appears to have made it is unimportant.

ACTION for malicious prosecution, brought by George W. Ward against John R. Sutor. It appeared that the defendant made affidavit before the United States commissioner, charging that the plaintiff had unlawfully taken a letter from the post-office addressed to the defendant, upon which the United States district attorney presented and returned into the United States circuit court a criminal information, and the plaintiff was found not guilty by a jury, and discharged. On the trial he offered in evidence a transcript containing the affidavit made before the commissioner, the criminal information based thereon, and the verdict of the jury, certified from the United States circuit court. The offered evidence was excluded, and under the court's instruction the jury returned a verdict for the defendant.

Hutcheson, Carrington, and Sears, for the appellant.

Charles E. Dwyer, for the appellee.

WALKER, A. J. The questions of practice raised by appellee are not well taken. The bill of exceptions shows the precise grounds of the ruling of the court in excluding the certified copy from the United States circuit court, viz., "that the United States circuit court had no jurisdiction: *Ex parte Wilson*, 114 U. S. 429; that the proceeding was a nullity, and the evidence offered was not competent for any purpose in this cause." The petition setting out these proceedings as cause of action, it is manifest that, without evidence of them, the plaintiff must necessarily fail; nor could the defect have been cured by any testimony whatever. The ruling, if error, was necessarily injurious to the plaintiff.

As to the failure of the clerk to certify that the copy was of an affidavit by defendant, etc., the failure was unimportant, unless the certificate to these matters would have been testimony. The custodian of judicial records, in giving copies, only sets them out as they appear, and so certifies. The record and the copies of affidavit and verdict speak for themselves.

Upon the effect of the excluded testimony, authorities are conflicting. Following the preponderance in them, and giving due regard to the rights of individuals suffering personal injury, we hold that one maliciously and without probable cause putting into operation the machinery of judicial proceedings resulting in the arrest and trial of the accused, thereby incurs liability from which, when sued for malicious prosecution, he is not relieved by the fact that the subsequent proceedings in the prosecution so begun, and in a court having jurisdiction of the subject-matter, were so irregular that had a conviction resulted the judgment would have been a nullity: 2 Greenl. Ev., sec. 449; 1 Am. Lead. Cas. 209; Wait's Actions and Defenses, secs. 338, 339; *Morris v. Scott*, 21 Wend. 281; 34 Am. Dec. 236; *Bauer v. Clay*, 8 Kan. 583; *Stone v. Stevens*, 12 Conn. 225; *Sweet v. Negus*, 30 Mich. 406; *Bixby v. Brundige*, 2 Gray, 129; 61 Am. Dec. 443; *Hays v. Younglove*, 7 B. Mon. 545; *Turpin v. Remy*, 3 Blackf. 215; and *Allen v. Greenlee*, 2 Dev. 371.

For the error in excluding the certified transcript of the proceeding in the United States circuit court, the judgment below is reversed, and the cause remanded.

MALICIOUS PROSECUTION, when action for will lie: *Clements v. Excavating Apparatus Co.*, 67 Md. 461; 1 Am. St. Rep. 409, and note 412; *Eastin v. Bank of Stockton*, 66 Cal. 123; 56 Am. Rep. 77; *Wetmore v. Mellinger*, 64

Iowa, 741; 52 Am. Rep. 465. To sustain the action, it is a sufficient termination of the criminal proceeding out of which the cause of action arose, if there was a dismissal by the county attorney without trial: *Bell v. Matthews*, 37 Kan. 687.

MALICIOUS PROSECUTION. — TERM "IRREGULARITIES," as applied to judicial proceedings, does not include false allegations of fact made as the foundation for a suit in which the allegations are to be proved or disproved: *Everett v. Henderson*, 146 Mass. 89; 4 Am. St. Rep. 284.

COPIES OF RECORDS, when sufficiently certified: *West Feliciana R. R. Co. v. Thornton*, 12 La. Ann. 736; 68 Am. Dec. 778, and note.

GULF, COLORADO, AND SANTA FE RAILWAY CO. v. DONNELLY.

[70 TEXAS, 371.]

NEGLIGENCE. — IT IS THE DUTY OF AN EMPLOYEE, who continues in the service after the discovery of defects in the machinery in use connected with the service affecting his safety, and which render his employment more than ordinarily dangerous, to inform the employer, and if the latter promises to repair in a reasonable time, the former will not be held to have waived the defects or assumed the risks until a reasonable time has elapsed after the promise.

RAILROAD COMPANY IS LIABLE TO ITS SECTION-FOREMAN for injuries received by him, where, having informed the company of the unsafe condition of the road-bed, he was furnished with no material to repair it, and afterwards the road was broken up by a passing train, and the foreman, while subsequently passing that part of the road in a hand-car, in the performance of his duties, in ignorance of the recent accident, and while exercising due care, sustained the injury complained of by reason of the broken road.

ACTION to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant. The opinion states the case.

J. W. Terry, for the appellant.

W. B. Denson and J. R. Burnett, for the appellee.

COLLARD, J. There is a principle of law in the text-books, well supported by authority, and especially in this state by the opinion of Justice Stayton in the *Drew* case, 59 Tex. 12, that where an employee remains in the service of the employer after discovery of anything in the machinery or appliances connected with the service affecting his safety, and rendering his employment more than ordinarily dangerous, he must inform the employer, as otherwise he assumes all the risk of increased danger; and if the employer promise to re-

pair in a reasonable time, the servant will not be held to have waived the defects or assumed the risks until a reasonable time has elapsed after the promise: Beach on Contributory Negligence, 372; Shearman and Redfield on Negligence, sec. 96.

The principle is a modification of the severity of the rule that holds employees to assume all danger from defects known to them, or which might have been known by the use of ordinary care while in the service of the employer, the general rule being that he cannot remain in the employment without assuming the risks.

The appellant says that no definite promise was made to appellee to furnish material for repairing the road; that if there was, the appellee could not remain in the service of the company longer than a reasonable time after such promise without assuming the risks known to exist, and that he should be held to have assumed the risks under the evidence. He complains that the court refused to charge the jury, upon request of appellant, upon these phases of the case.

We do not think the court should have charged the jury as requested; the law contained in the refused charges was not applicable to the case. It does not appear from the case as made that plaintiff applied for material to repair the road, or complained to the road-master of the bad condition of the road on account of increased danger to himself in his employment as section-foreman. As such employee, he had charge of the track in his section; it was his duty to keep it in repair as well as he could with the material and force furnished. He was responsible for the condition of the road on his section. Finding it in bad condition,—from five to seven rotten ties to the rail that ought to have been taken out and replaced with sound ties,—he reported the facts to his superior, whose duty it was to furnish material and men to make repairs; he reported the unsafe condition of the road, and demanded necessary material to discharge his duties to the company and the public. It does not appear that he did this because he was himself in danger of being injured by the defects in the road, but because it was his duty to so report to make the road safe for trains, and to prevent wrecks of freight and passenger trains. He was only using a hand-car in the discharge of his duties; it is not shown that the road was dangerous for hand-cars. It is shown that a hand-car could not have broken the tie. A passenger train had passed over the road while he was at work

on another part of the road, and the broken tie was attributed to the passenger train.

Because the plaintiff was in the discharge of his duty as a faithful servant of the company, and so ascertained the unsafe condition of the road to trains, and the liability of wrecks, and reported the facts to his superior, should he be required to quit the service of the company to avoid remote risks to himself not anticipated? Because plaintiff reasonably anticipated the happening of one event does not require him to foresee that the event will be the cause of another that might result in his injury: *Shearman and Redfield on Negligence*, secs. 9, 10; *Beach on Contributory Negligence*, sec. 11.

If the track was in bad condition on account of the failure of defendant to furnish plaintiff with material to keep it in repair, plaintiff would be exonerated from all responsibility for its unsafe condition. If such was the case, and the road was broken up by a passing train, and plaintiff knew nothing of it, it having been recent, and he being at work on another portion of the road at the time, and in passing over the place in a hand-car, the first time after the tie was broken, he was exercising due care, and without fault or contributory negligence on his part he was injured, the defendant would be liable. The evidence makes such a case, according to our view of it. The court instructed the jury that the employee assumed all risks incident to the nature and character of his employment, and also correctly charged the law of contributory negligence as applicable to the case, and the law of defendant's liability. We do not believe there was any occasion to give the charges asked by defendant and refused by the court.

We conclude the verdict should not be disturbed, and there being no error in refusing charges asked by defendant, or in the charge of the court, we are of opinion the case should be affirmed.

MASTER AND SERVANT. — SERVANT WHO ENGAGES TO PERFORM HAZARDOUS WORK assumes the risks incident thereto: *Woodward v. Shumpp*, 120 Pa. St. 458; 6 Am. St. Rep. 716, and note 719.

EMPLOYEE WHO CONTINUES IN SERVICE AFTER NOTICE OF DEFECTS augmenting danger of the service assumes the risk as thus increased, even though he may object or complain, unless he is induced to continue by an express or implied promise of the master to remove the cause that augments the danger: *Indianapolis etc. R. R. Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578, and note 592; *Counsell v. Hall*, 145 Mass. 168; *Needham v. Railroad Co.*, 85 Ky. 423.

GALVESTON OIL COMPANY v. MORTON.

[70 TEXAS, 400.]

NEGLIGENCE. — OWNER OF REAL PROPERTY IS ENTITLED TO ITS EXCLUSIVE Use and enjoyment, and is not liable to others for injuries occasioned by its unsafe condition, when the person sustaining the injury was not at or near the place of danger by lawful right, and when the owner has neither expressly nor impliedly invited him there, nor allured him by attractions or inducements exhibited or held out in some way calculated to lead him into danger, without giving notice of the peril to be avoided.

DAMAGES ARE NOT RECOVERABLE BY A TRESPASSER or mere licensee who is injured by any dangerous machine or contrivance on the land or premises of another, unless the contrivance is such as the owner may not lawfully erect or use, or when the injury is inflicted willfully, wantonly, or through the gross negligence of the owner or occupier of the premises.

NEGLIGENCE. — ONE WHO ENTERS THE PREMISES OF ANOTHER OF HIS OWN VOLITION, on his own exclusively personal business, not being an employee, or invited by the owner of the premises or those in charge, is not entitled to recover damages for injuries inflicted by machinery in operation on the premises, while he was passing through a place where employees usually go, and in which only mechanical operations are usually performed, by means of appliances not dangerous from their location and use to persons familiar with the locality.

ACTION for the recovery of damages alleged to have been caused by the negligence of the defendant. **The facts appear in the opinion.**

F. Charles Hume, for the appellant.

Forster Rose and E. D. Cavin, for the appellee.

MALTBIE, P. J. The appellee, Digby B. Morton, wishing to see Desmond, an employee of the Galveston Oil Company, went to the office of the company and inquired for him. Some one in the office, whether an employee of appellant or not does not appear, informed Morton that Desmond was in the oil-room, and upon inquiring how he could get there, was informed that he could go through the office or through the street entrance. Arriving at the oil-room, appellee inquired again for Desmond, and was told that he had passed through five or ten minutes before, went in the direction that he was told that Desmond had gone, and in passing through the second room from the oil-room, received the injuries for which he sues. Appellee testified that the room in which the accident occurred contained cotton-seed in sacks piled upon each other as high as a man's head; that there was only one passage-way between the rows of sacks four or five feet wide. A man was in the room shoveling cotton-seed, his back to appellee;

the man said nothing. Appellee followed the passage between the sacks in pursuit of Desmond, and stepping upon a pile of cotton-seed in this passage, a foot and a half or two feet high, his foot sank down through the seed into a screw or endless worm under the floor, and was thus injured. The worm was hidden or concealed from view by the cotton-seed. The cotton-seed may have been in motion, but the motion could not be discovered, or was not seen by appellee. He did not know that the worm was under the seed. His business was with Desmond personally; he did not request a guide, nor was any furnished, and no warning was given him of the danger.

It appears that the iron screw or worm takes the seed from one part of the building to another, thence to the elevator, from which they are conveyed to the upper story. The feeder, such as was used in this mill, is in universal use to convey seed. There was and is nothing unusual in its construction or operation. It runs under the floor, which is so made that two or three planks can be taken up, exposing the feeder, so that seed can be dumped into it, and carried to wherever wanted; seed are unloaded where the worm runs, and are transported by it to any desired point. But for the feeder, seed would have to be wheeled from the place where unloaded from the cars to the elevator. The hole in the worm is about twelve and a half inches across, and the planks covering it, which are removed when seed are to be received, are about two feet long. The conveyer is something like a flat hopper. A brick wall runs on each side of it as a bearing for a two-foot board, and by reason of the wall and the board the seed cannot drop on the sides of the conveyer and clog it. Feeder works on same principle as a corn-hopper when corn is being ground.

The jury found that appellee was not guilty of negligence; and in the view taken by us of the case, it will not be necessary to consider whether this finding is supported by the evidence. Negligence, as applied by the courts to the affairs of life, depends upon a variety of conditions, circumstances, and surroundings. And acts or conditions that would be held to be gross negligence under some circumstances and as to some individuals, under other circumstances, and as to other persons, would not be considered in any degree negligent. It is a general principle of law that a person, natural or artificial, may use his property as he pleases, so that he does not willfully or wantonly injure another, in person or property, unless

he owes some duty in some way to such other person, when he would be bound to respond in damages on account of an injury inflicted on such person through negligence or the want of ordinary care.

The owner of real property is entitled to the exclusive use and enjoyment of the same, and is not liable to others for injuries occasioned by its unsafe condition when the person receiving the injury was not at or near the place of danger by lawful right, and when the owner has neither expressly nor impliedly invited him there, nor allured him by attractions or inducements exhibited or held out in some way calculated to lead him into danger, without giving notice of the peril to be avoided: *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; *Bennett v. Railroad Co.*, 102 U. S. 577; *Carleton v. Franconia Steel Co.*, 99 Mass. 216; Cooley on Torts, 605, 606; *Pierce v. Whitcomb*, 48 Vt. 127; 21 Am. Rep. 120; *Pittsburgh etc. R. R. Co. v. Bingham*, 29 Ohio St. 367; 1 Thompson on Negligence, 303, sec. 3; *Id.*, 283 et seq. The doctrine is established by the above and many other cases, that a trespasser or mere licensee who is injured by any dangerous machine or contrivance on the land or premises of another cannot recover damages unless the contrivance is such that the owner may not lawfully erect or use, or when the injury is inflicted willfully, wantonly, or through the gross negligence of the owner or occupier of the premises.

It is sometimes difficult to determine whether the injured party is a mere licensee, or whether he is on the premises by the implied invitation or by the allurements or enticement of the owner. It is said by Mr. Campbell, in his treatise on negligence, that the underlying distinctions appear to be that an invitation is inferred where there is a common interest or mutual advantage; while a license is inferred where the object is the mere benefit or pleasure of the person using it: *Burnett v. Railway*, 102 U. S. 584, 585. This distinction is believed to be too narrow to embrace many cases in which owners and occupiers of land have been held liable for injuries negligently inflicted upon persons entering the premises on the implied invitation of the owner, such as where walks have been built by the owner over his grounds, along or adjoining a public street or walk; or where turn-tables and other dangerous appliances have been left unlocked in places calculated to attract or allure children; and other cases of like character. As a general proposition, we think the distinction based upon cor-

rect principles. In this instance, appellee went to the mill of appellant solely on his own business, and not at all for the advantage or benefit of appellant. He, for some reason not disclosed, seemed intent on finding Desmond. He went in search of him from the office to the oil-room, and thence to the second room beyond, where he met with the accident. The room where it occurred, according to the testimony, was set apart for the storage and distribution of cotton-seed by means of screw or endless worm. It does not appear from the evidence that it was used for any other purpose; nor is it apparent that it was ever contemplated or intended that any one except the employees of the mill should ever pass through this room. The worm was constructed and operated in the usual manner of such appliances, was highly useful and convenient for the purposes for which it was designed, and was in no sense dangerous to persons knowing its location, and the mode of its operation.

The location of the room and its surroundings do not appear to have been calculated to allure or entice one to pass through it. Nor do we think it could have been reasonably anticipated that a stranger to the situation would ever attempt to do so, unless a visitor under charge of the proprietor. In our opinion, the facts fail to show that appellant owed appellee the duty to send a guide along to prevent him from becoming entangled in the machinery and being injured, for the reason that he was not there in business with appellant, or by its invitation, either express or implied, because he made no request for any one to accompany him. To require the proprietor of a steamboat, a factory, or a mill, conducted in the usual manner, whenever a man should ask permission to see an employee, engaged in his duties, to anticipate that such person might become involved in some dangerous machinery, hidden or open, would be to exact too high a degree of diligence; but the presumption should be indulged that the person making the inquiry is acquainted with the machinery, its construction and position, and needs no attendant, or otherwise he would have made a request to that effect. We are of opinion that the evidence does not support the verdict, and that there was error in submitting to the jury the question whether appellee entered the mill by the invitation of appellant, there being no evidence tending to show that he did, for which the judgment should be reversed, and the cause remanded.

OWNER OF PREMISES WHO INVITES PERSONS UPON THEM ASSUMES an obligation that they are in safe condition: *Selinas v. Agricultural Society*, 60 Vt. 249; 6 Am. St. Rep. 114, and note 117; *Donaldson v. Wilson*, 60 Mich. 86; 1 Am. St. Rep. 487, and cases collected in note 489.

OWNER OF PREMISES IS NOT LIABLE IN DAMAGES for injury sustained by another while lawfully thereon, in the absence of any evidence as to the direct cause of the injury, or that it was the result of the owner's negligence: *Huey v. Gahlenbeck*, 121 Pa. St. 238; 6 Am. St. Rep. 790, and note 792-795.

EVERY PERSON, WHETHER MERE LICENSEE, OR UPON EXPRESS OR IMPLIED INVITATION, seeking access to a place of business, is himself bound to use ordinary care: *Parker v. Publishing Co.*, 69 Me. 173; 31 Am. Rep. 262.

RAILROAD COMPANY, liability for injury to one wrongfully on track: *Railroad Co. v. Roach*, 83 Va. 375; *Railroad Co. v. Monday*, 49 Ark. 257; *Williams v. Railroad Co.*, 72 Cal. 120.

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY v. BOOZER.

[70 TEXAS, 580.]

DAMAGES. — IN ACTION FOR DAMAGES FOR PERSONAL INJURIES TO MINOR, BROUGHT FOR HIS BENEFIT by a next friend, the damages which diminish his capacity to earn a living must be limited to the period after his majority, for until that period is reached he is not entitled to the proceeds of his own labor. But if there is no complaint that the verdict of the jury in favor of the plaintiff was excessive, the judgment will not be reversed because of the failure of the court in its charge to thus limit the liability of the defendant.

NEGLIGENCE. — OWNER OF PROPERTY WHO HAS BEEN ACCUSTOMED TO ALLOW OTHERS a permissive use of it, such as tends to produce confident belief that the use will not be objected to, and therefore to act on the belief accordingly, must be held to exercise his rights in view of the circumstances, so as not to mislead others to their injury without a proper warning of his intention to recall the permission.

ALTHOUGH IT MIGHT NOT BE STATUTORY DUTY OF RAILROAD COMPANY TO SIGNAL the approach of a train as required at a public crossing, at a point where it permits the user by the public of a path crossing its track, yet the failure to do so might, in view of the facts, constitute negligence.

DEGREE OF CARE REQUIRED IN ORDER TO AVOID LIABILITY FOR NEGLIGENCE must be proportioned to the nature of the act performed, the place where performed, and the extent of danger and injury likely to result from a failure to use due care in avoidance of injury to others.

IT CANNOT BE HELD THAT THE SAME DEGREE OF CARE SHOULD BE EXPECTED of a child in crossing a railroad track as must be of an adult, in order to avoid the imputation of contributory negligence. Whether the child used such care in attempting to cross the track, and in ascertaining the danger that attended his act, as would be incumbent on one of his age, is a question for the jury.

ACTION for personal injuries received by the plaintiff while crossing the defendant's railroad track not at a public crossing. The material facts appear in the opinion.

R. D. Armond, for the appellant.

Woods, Wilkins, and Cunningham, for the appellee.

STAYTON, A. J. This action was brought by appellee, through his next friend, to recover damages for an injury alleged to have been caused by negligence of the employees of the appellant.

At the time of the injury the appellee was a child in his twelfth year, and he was injured while attempting to cross the railway track.

The first assignment of error is as follows: "The court erred in the fifth paragraph of its charge to the jury, wherein it is stated by the court to the jury, that in estimating the amount of damages that plaintiff might recover, the jury might consider plaintiff's diminished capacity, if any, to labor and earn a livelihood, for the following reasons: The plaintiff is a minor; the evidence shows he was living with his mother at the time of the injury, and still is; she is therefore entitled to his earnings during minority; that his father is dead, and that his mother has now a suit pending against defendant for damages occasioned plaintiff from the same accident."

The part of the charge complained of, considered with relation to an adult seeking to recover for an injury to himself, would be strictly correct, but in the case in which it was given the court should have limited the liability for damages resulting from diminished capacity to labor caused by the injury to the period after the appellee's majority, for until that period was reached the appellee would not be entitled to the proceeds of his own labor, and would not be entitled to damages on account of his diminished capacity. We are of the opinion, however, that we would not be authorized to reverse the judgment on account of this charge, even if it was not the duty of the appellant to have asked a proper charge in this respect, for there is no complaint made that the verdict of the jury was excessive. The only effect the charge could have had would have been to cause an excessive verdict, and it in no way had a bearing on the question whether the appellant was liable at all under the facts.

The controversy in the lower court, and here, is as to whether, under the facts, the appellant is liable at all.

The appellee was injured while attempting to cross the track at a path leading from the thickly populated part of the city of Denison to houses on the opposite side of the railway, which seems to have been frequently used by many people for a considerable period, without objection. In such a case, as said by the supreme court of Pennsylvania: "If an owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to experience his rights in view of the circumstances so as not to mislead others to their injury, without a proper warning of his intention to recall the permission."

Whether, in view of the facts attending the use of the path, the railway company used that care which it ought to have used to guard persons from injury, was a question for the jury, and there was evidence tending to show that no lookout ahead of the train was exercised, though upon this point there was a conflict of evidence; but that there was any warning given of the approach of the train other than such as would result from its movement, is not claimed.

Although it might not be the statutory duty of a railway company, at such a place, to give the signals of an approaching train, as is required at a public crossing, yet the failure to do so might be negligence. The engineer stated that he was looking ahead, and that he did not see the boy at all, but from the other evidence in the case the jury may have come to the conclusion that his statement was not true. The degree of care that should be used must be proportioned to the nature of the act performed, the place where performed, and the extent of danger and injury likely to result from a failure to use due care in avoidance of injury to others. We cannot say, under the evidence in this case, that the employees of the appellant used that care which the law requires.

This case was before this court at a former term, when a judgment in favor of the appellee was set aside, on the ground that it appeared from the evidence that the injury resulted from the contributory negligence of the appellee. Another jury has passed on the case, under evidence tending to relieve the appellee from the charge of contributory negligence, which was not before the jury on the former trial. As the case now stands, were the appellee an adult, it seems to us the verdict should be again set aside; but we cannot say that the same

degree of care should be exacted of a boy of the appellee's age as must be of an adult. Whether he used that care in attempting to cross the track, and in ascertaining the danger that attended his act, incumbent on one of his age, was a question submitted to the jury by a charge which, on this point and all others bearing on the question of the liability of the appellant at all, was as favorable to the appellant and as exacting on the appellee as the facts would have warranted.

Two juries have passed upon the facts, twice have judges of the district court refused to grant new trials, the appellee was of tender years, there was evidence from which the jury might find that the employees of the appellant did not use that care which, under the circumstances, should have been used, and the jury were in position to determine whether the acts of the appellee were, in one of his age, the exercise of such care as such a person should exercise.

The rules by which this court is necessarily governed in setting aside verdicts, on the ground that they are contrary to the evidence, have been too often announced now to require repetition. We cannot see our way clear to the granting of such relief in this case, and the judgment must be affirmed.

WHEN A RAILROAD COMPANY HAS LONG, CONSTANTLY, AND NOTORIOUSLY PERMITTED the public to cross its track at a place not in a highway, it is bound to use reasonable care toward persons so crossing, and to give notice and warning to them, so as to protect them from injury: *Byrne v. N. Y. etc. R. R. Co.*, 104 N. Y. 362; 58 Am. Rep. 512; *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521; *Harriman v. Pittsburgh etc. R. R. Co.*, 45 Ohio St. 11; 4 Am. St. Rep. 507, and cases collected in note 526; *Palmer v. Railroad Co.*, 112 Ind. 250.

CARE REQUIRED of travelers at railroad crossing: See *Reed v. St. Paul etc. R. R. Co.*, 74 Iowa, 188; *Palmer v. Railroad Co.*, 112 Ind. 250; *Roberts v. Railroad Co.*, 83 Va. 312; *Omaha etc. R. R. Co. v. O'Donnell*, 22 Neb. 475.

LOSS OR DIMINUTION OF CAPACITY to follow one's usual business or employment as an element of damages for personal injury: *Alabama etc. R. R. Co. v. Yarbrough*, 83 Ala. 238; 3 Am. St. Rep. 715, and cases collected in note 718.

CHILD OF IMMATURE YEARS IS NOT HELD to any greater degree of care than might reasonably be expected of one of his age: *Moebius v. Herrman*, 108 N. Y. 349; 2 Am. St. Rep. 440.

GOFF v. JONES.

[70 TEXAS, 573.]

HOMESTEAD. — BOND FOR TITLE EXECUTED BY HUSBAND AND WIFE TO CONVEY THEIR HOMESTEAD can be enforced against the husband by a bill for specific performance, if at any time before the bond should become barred, such homestead was abandoned and a new homestead was acquired. Or if the facts are such as would prevent the enforcement of a specific performance, a suit for damages will lie against the husband for breach of the condition of the bond, if damage has been sustained.

PROVISION OF TEXAS CONSTITUTION, ARTICLE 16, SECTION 50, under which mortgages, liens, deeds of trust, and deeds involving a condition of defeasance on the homestead are void, has no application to a contract to convey at a future time, and after the property has lost its homestead character.

VENDOR AND PURCHASER — MISTAKE IN DESCRIPTION OF LAND. — Where a bond for title incorrectly describes the land to be conveyed, the purchaser is entitled, in a proper case, to a correction of the bond, and the mistake may be established by parol evidence.

ACTION to compel the specific performance of a contract to convey land, or, in default, for damages. The opinion states the case.

James B. Goff, for the appellant.

Walton, Hill, and Walton, for the appellees.

COLLARD, J. It was decided by this court on a former appeal of this case that the bond for title of Jones and wife to Goff to convey their homestead could not be enforced by a bill for specific performance. The decision was made upon the ground that the wife could only convey the homestead by deed executed and acknowledged by her in the manner required by the statute, and that her privilege to retract the sale continued until the acknowledgment was taken, which was the final act of sale on her part. She cannot contract beforehand in reference to her right to retract, so as to deprive herself of the right: 63 Tex. 248. The record in the case as it was then presented required the court to pass upon the power of the court to enforce performance of a title bond of the husband and wife to convey the homestead while still occupied as a homestead. After the case was reversed and sent back, the plaintiff, Goff, amended his petition, setting up that defendants had erected a new dwelling as a homestead on two lots east of the land sold, as it was their intention to do at the time the bond was executed, and had, about the fifteenth day of July, 1883, seven days after maturity of the

bond, in pursuance of their original intention, moved from and abandoned the premises sued for as constituting any part of their homestead, and had moved on, adopted, and made said dwelling-house on the two lots their homestead, since which time the premises sued for have constituted no part of the homestead, and have not been used in any way for homestead purposes.

These allegations present a totally different question from the one before the court on former appeal. The question now is, Can the husband be compelled to execute the bond, the old homestead being abandoned and a new one being acquired? The premises are community of the husband and wife, and no longer constitute any part of the homestead. His deed alone would convey the property, and if he execute the deed called for in the bond, it would convey the title. Should he be protected from a performance of his contract? The constitution of the state declares that the owner, if a married man, cannot convey the homestead without the consent of the wife, given in such manner as may be prescribed by law: Const., art. 16, sec. 50. There was a similar provision in the constitution of 1845 (Paschal's Digest, p. 65, art. 7, sec. 22), which was discussed by the supreme court in *Brewer v. Wall*, 23 Tex. 589, and the conclusion reached that a title bond, executed to convey the homestead, by the husband, the wife joining without privy examination and acknowledgment, could be enforced after the death of the wife, all legal obstacle to its performance being removed. Mr. Justice Bell, in delivering the opinion, says: "It is true that a husband is not at liberty to alienate the homestead during the wife's life, without her consent, but we cannot perceive that a bond executed by him in his wife's lifetime, conditioned that he will convey his homestead, with a perfect title, at a future time, would be a void instrument in contemplation of law. We think such a bond would be binding upon the husband, and that upon a breach of it, damages might be recovered against him by suit upon the bond. Undoubtedly a bond to compel the wife to convey at a future time would be void, because it would be an undertaking to do an unlawful thing. But a bond to make title at some future day to a certain tract of land, the same being the homestead of the obligor and his wife and children, would not be an unlawful undertaking. Such a contract might be entered into in the confident expectation that the wife would freely make the necessary convey-

ance; or it might be entered into with the intention to acquire another homestead before the time elapsed for the performance of the bond. It is true that while the premises which the party might so undertake by his bond to convey remained the homestead of the obligor and his wife, the courts would not decree a specific performance of the bond. But if the wife should die before the time expired for the performance of the bond, or if, before the expiration of that time, the obligor in the bond and his wife should acquire another homestead, then the courts might decree specific performance, because every legal obstacle to a specific performance would be removed."

The doctrine in *Brewer v. Wall*, *supra*, was approved in *Cross v. Everts*, 28 Tex. 534, 535, and had the facts of the case shown that the old homestead had been abandoned, and a new home acquired, the rule would have been enforced, but because the old homestead had not been abandoned, the court held the case did not come within the rule: See also *Jordan v. Godman*, 19 Id. 274, and Thompson on Homesteads, sec. 483, and following.

From the foregoing authorities, we are of the opinion the title bond sued on could be enforced against Charles G. Jones, if the facts alleged as to abandonment of the old homestead and the acquisition of the new one are true. At the time fixed by the bond for its performance, according to the allegations of plaintiff's amended petition, it could not have been enforced, because at that time the property was still the homestead; but that is immaterial. We think if it was abandoned and a new homestead was acquired at any time before the bond should become barred, the suit for specific performance could be maintained. If, however, the facts alleged are not true, Goff can maintain his suit for damages against Jones for breach of the conditions of the bond, in which case the measure of damages would be the amount expended by Goff, with consent of defendant in good faith under the contract of sale, and the difference in the contract price and the value of the premises at the time of the performance of the bond, excluding from such value at the time of the performance any additional value the improvements made by Goff may have given to the premises: *Kempner v. Heidenheimer*, 65 Tex. 587.

Recurring to the main question in this case,—the right of specific performance of the title bond,—we must note the dis-

inction made in our present constitution between sales of the homestead and mortgages, liens, deeds of trust, and deeds with a condition of defeasance. Such liens and mortgages can never become valid, and a deed involving a condition of defeasance is void: Const. 1875, art. 16, sec. 50. There is no such provision respecting conveyances or contracts to convey. Had there been such a provision, we could not have held the title bond enforceable against the husband under the allegations made. Under the constitution of 1845, there was no such provision as to mortgages and liens upon the homestead, and hence it was held that while a mortgage executed by the husband and wife upon the homestead could not be enforced as long as the property retained its homestead character, it could be foreclosed in a suit against the husband alone after the homestead had been abandoned and a new one acquired: *Stewart v. Mackey*, 16 Tex. 56; 67 Am. Dec. 609. The constitution of 1876 prescribes a different rule. Under it, a mortgage upon the homestead can never become valid. We note the distinction to prevent a misconception of the principle decided in the case before us as to enforce performance of a title bond to convey the homestead by suit against the husband after the property has lost its homestead character, concerning which there has been no change in the organic law or statutes: See section of Const. 1869 cited, and R. S., art. 560.

We conclude the court erred in sustaining defendant's exceptions to that part of plaintiff's petition asking specific performance of the bond against Charles G. Jones, on the ground of abandonment of the old and acquisition of a new homestead. The only remaining question in the case is, Should the title bond be corrected so as to include the sixteen feet not embraced in the description of the bond? Plaintiff alleges that there was a mistake in the description in the bond,—92 feet front on College Avenue, instead of 108; that he bought the ground from the Green line on the west to include the dwelling and eight feet pass-way on the east of the dwelling; that the fact that the ground was to include the dwelling and the eight feet pass-way was a material inducement to the purchase; that Jones assured him ninety-two feet was the distance to include the premises, and he accepted the bond with that understanding, when in fact ninety-two feet front does not include the dwelling by eight feet on the east end and the eight feet pass-way still east of the house.

We think the allegations, if true, entitle plaintiff to a correction of the bond, and that the facts alleged may be established by parol. The court should have heard the proof, and if the facts were as alleged, relief should have been granted by a correction of the description: *Raines v. Calloway*, 27 Tex. 685.

We are of the opinion the judgment of the court below ought to be reversed, and the cause remanded for a new trial.

PARTY CANNOT HAVE TWO HOMESTEADS at one time: *Kaes v. Gross*, 92 Mo. 647; 1 Am. St. Rep. 767, and note; and if he attempts to acquire a second while the first is in force, the second is void and subject to judgment liens: *Waggle v. Worthy*, 74 Cal. 266; 5 Am. St. Rep. 440.

ABANDONMENT OF HOMESTEAD, what constitutes: *Kaes v. Gross*, 92 Mo. 647; 1 Am. St. Rep. 767, and cases collected in note 775. Homestead rights of husband and wife are lost by a voluntary abandonment of the homestead. Not only can the husband bind his children by such voluntary abandonment, but the homestead rights of the wife also are lost by her voluntarily leaving the home and accompanying the husband when he abandons it: *Reece v. Renfro*, 68 Tex. 192; and see *McElroy v. McGoffin*, 68 Id. 208. Ordinarily, a lease of a homestead for life is conclusive evidence of an abandonment of it; but where the lease reserves to the lessor the right to return to the homestead, and it is his intention to return, there is no abandonment: *Gates v. Steele*, 48 Ark. 539. And failure to live upon a homestead for about seven years prior to the conveyance of it to another is not an abandonment of it, where the husband and wife both intended to occupy it again as a homestead as soon as their affairs would permit, and they all the time retained the use of a portion of the house for the storage of their goods: *Repenn v. Davis*, 72 Iowa, 548. So occupation of the business homestead of an insolvent by his assignee, to whom possession is delivered with the merchandise contained therein, will not, if possession for business purposes be resumed as soon as the assignee discharges the trust by a disposition of the goods, work an abandonment of the homestead rights: *Gassoway v. White*, 70 Tex. 475. But if a widow sells the homestead of her deceased husband, she thereby abandons it, and it at once becomes assets in the hands of the administrator for the payment of debts: *Garibaldi v. Jones*, 48 Ark. 230. Mortgage of the homestead by the husband without the wife's signature is not valid: *Conway v. Elgin*, 38 Minn. 469; even after the homestead right of the wife has expired, in Wisconsin: *Herron v. Knapp*, 72 Wis. 553.

SPECIFIC PERFORMANCE OF HUSBAND'S BOND TO CONVEY HOMESTEAD WILL NOT BE DECREED while the premises remain the homestead of the obligor and his wife; but if the wife should die before the time expired for the performance of the bond, or if before that time another homestead should be acquired, specific performance may be decreed: *Brewer v. Hall*, 23 Tex. 585; 76 Am. Dec. 76; and see *Guid v. Guid*, 14 Cal. 506; 76 Am. Dec. 441.

HAYS v. GAINESVILLE STREET RAILWAY CO.

[70 TEXAS, 602.]

NEGLIGENCE IS RELATIVE TERM, and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances usually impose.

IN DETERMINING WHETHER IT IS ACT OF NEGLIGENCE to go upon a street-car track, the frequency of the passage of cars, their usual rate of speed, whether many people are accustomed to cross at the particular place, whether there is a duty imposed by law upon the drivers to keep a lookout, and give warning of approaching danger, and the like circumstances, may be taken into consideration.

NEGLIGENCE. — WHERE CITY ORDINANCE UNDER WHICH STREET-CAR RAILWAY COMPANY IS INCORPORATED, MAKES IT THE DUTY of the car-driver to keep a vigilant lookout for all persons approaching the track, and to stop the car on the first appearance of danger, a failure to perform this duty is of itself an act of negligence.

TERM "GROSS NEGLIGENCE" INCLUDES ALL LESSER DEGREES of negligence, and when the plaintiff's petition charges that an act was done through gross negligence, this does not preclude evidence entitling him to recover for a lesser degree.

ALTHOUGH NEGLIGENCE OF PERSON INJURED BY ANOTHER MAY CONTRIBUTE to the injury, yet if the person inflicting it discovers the peril of the other in time, by the reasonable exercise of the means at hand, to prevent the injury, the law considers the failure to use such means as the proximate cause of the injury, and will permit a recovery, notwithstanding the injured party was guilty of contributory negligence.

EVIDENCE. — IT IS PROPER THAT OBJECT ITSELF to which testimony relates should be brought into court and exhibited, when this can be done.

CHARGE OF COURT TO JURY in the particular case held to be improper, on the ground that it was argumentative.

E. A. Blanton, and Hill and Hill, for the appellant.

Potter and Hughes, for the appellee.

MALTBIE, J. Reese A. Hays, the appellant, a boy eleven years old, was seriously injured by reason of the wheels of one of the cars of the Gainesville Street Railway running over his foot, under the following circumstances: Appellant, in company with a number of other boys, was returning from school along North Dixon Street, in the city of Gainesville, over which appellee had constructed its street railway, and was engaged in operating its cars. Hays was in the street on the west side of appellee's track, going in the direction of his home, which was southeast of the track. At the same time, one of appellee's cars was approaching from the north, drawn by a mule, going in a slow trot. Hays and a boy named Purdy were playing, the former running along, and within a few feet of the street-car track, closely pursued by Purdy, who

was about to overtake him, when Hays turned suddenly to the left, colliding with the mule drawing the car, striking the mule about the shoulders, causing him to shy, which caused Hays to fall. The mule moved on, drawing the car-wheels over Hays's foot and ankle, fracturing the bones, and causing much pain and suffering. It was shown that from the shoulders of the mule to the front wheel of the car is a distance of eleven or twelve feet; and there was evidence tending to show that by applying the brakes attached to this car it could have been stopped within a space of six feet. There was also evidence tending to show that the driver was careless and incompetent, and that he struck the mule a sharp blow with his whip just as appellant fell to the ground, though all these facts were disputed. The ordinances of the city of Gainesville, under authority of which appellee's road was constructed, require that all drivers of street-cars shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving toward it, and on the first appearance of danger to such persons or vehicles, the car shall be stopped in the shortest time and space possible; and that each driver shall have a whistle, and on the approach of danger to any person, animal, or vehicle, shall give an alarm.

The collision occurred near the point where appellant was in the habit of crossing the track in going to and returning from his home. He did not see or hear the car, though he could have done so had he listened or looked. The reason he did not see the mule in time to avoid the collision was, that he was looking back at his pursuer. The trial resulted in a verdict and judgment for the appellee. Alleged errors in the charge of the court and in the admission and rejection of evidence are relied on for a reversal of the judgment. The controlling question in this, as in almost all other cases of personal injury, is as to which party is guilty of negligence contributing proximately to the injury.

Negligence is a relative term, and its application depends on the situation of the parties and the degree of care and vigilance which the circumstances reasonably impose. The degree is not the same in all cases, but may vary according to the danger involved in the want of vigilance: Cooley on Torts, 630. To illustrate, it would involve little or no want of care to cross a road or street on foot used exclusively for ordinary travel, without looking either way for persons on horseback or in vehicles, because usually there is but little danger in so

doing, while it would be gross negligence to cross a railroad track, over which many trains of cars are accustomed to pass every hour in the day, without using the utmost vigilance and circumspection. In determining whether it is an act of negligence to go upon a street-car track, the frequency of the passage of cars, their usual rate of speed, whether more people are accustomed to pass at that particular place, whether there is a duty imposed by law on the drivers to keep a lookout and give warning of approaching danger, and the like circumstances, may be taken into consideration. In the present instance, the ordinance under which appellee was incorporated made it the duty of the car-driver to keep a vigilant lookout for all persons approaching the track, and to stop the car on the first appearance of danger, and a failure to perform this duty of itself would be an act of negligence. But the district court, for the purposes of the trial, considered the term "negligence," as applied to appellee, as synonymous with an intention on its part to inflict an injury on appellant. In the second paragraph of the charge, the jury are told that if plaintiff was injured through the carelessness of the driver of defendant or by the willful or intentional act of such driver, as charged in plaintiff's petition, to find in his favor. The allegations on the subject, briefly stated, are to the effect that the injury complained of was inflicted through the negligence of defendant, do not authorize the charge. And again, after giving a detailed statement of the acts leading to the injury, the petition charges that it was inflicted through the gross negligence of the defendant.

The term "gross negligence" includes all lesser degrees of negligence, and a charge in a petition that an act was done through gross negligence would not limit the right of recovery, if otherwise entitled, to an injury inflicted by the willful or intentional act of another. Negligence is of a negative character, and implies a want of care. In order for an act to be negligent, it is never necessary that it should be done through design, though it is said that an act may be so grossly negligent that it may be presumed to have been willfully or intentionally done.

The sixth paragraph of the charge is as follows: "Although you may believe, from the evidence, that the driver of said street-car was guilty of negligence which contributed to the injury in question, still if you further find, from the evidence, that the plaintiff was also guilty of negligence which directly

contributed to the injury, then the plaintiff cannot recover in this suit, unless the jury further find from the evidence that the negligence of the driver of said street-car was malicious and willful, or wantonly reckless, showing an utter disregard for plaintiff, and that the negligence of plaintiff was but slight, as will be hereinafter explained to you."

In the seventh paragraph of the charge, the jury is again told that if plaintiff was guilty of contributory negligence that he cannot recover, unless the injury was caused by the willful, wanton, or malicious act of the driver.

In the eighth paragraph the court charges: "By the term 'slight negligence,' as used in the sixth section of this charge, is meant the absence of that degree of care and vigilance which persons of extraordinary vigilance and foresight are accustomed to use under similar circumstances." The effect of these instructions was to preclude plaintiff from a recovery, unless he exercised extraordinary prudence and foresight to avoid the injury. If the injury was the result of the negligence of appellee, there is no rule of law that requires that appellant should have used more than ordinary caution to shield himself from the consequences of contributory negligence.

We are also of the opinion that the proposition announced in paragraph 6, and repeated in paragraph 7, of the charge, to the effect that if plaintiff was guilty of contributory negligence he cannot recover unless the car-driver willfully or intentionally inflicted the injury upon him, should not have been given except upon the theory that the driver failed to discover plaintiff's peril in time to avoid injuring him by the use of such means as a prudent and careful man would have employed under the same circumstances; for, if the driver could have thus avoided the injury after discovering plaintiff's peril, his want of ordinary care was the proximate cause of it, and defendant would be liable for damages. The reason why a person who, if guilty of contributory negligence contributing to his own injury, cannot recover, is because the policy of the law will not ordinarily permit one to recover who is himself at fault; but although the negligence of such person may contribute to his own injury, yet if the person inflicting it discovers the peril of the other in time, by the reasonable exercise of the means at hand, to have prevented the injury, the law considers the failure to use such means as the im-

mediate cause, and will permit a recovery, notwithstanding the injured party was guilty of contributory negligence.

On account of the prominence given in the charge to the doctrine that appellants could not recover if guilty of contributory negligence, unless the injury was inflicted willfully, wantonly, or maliciously, we do not think it likely that the jury understood paragraph 10 to be a qualification of the doctrine before announced and emphasized, though doubtless so intended by the court.

We think that when it becomes necessary, in a charge to a jury, that a doctrine given should be limited or qualified, that the qualification should follow the main proposition as nearly as convenient, in order to prevent any confusion in the mind of the jury. If taking into consideration the age of appellant and all of the other facts and circumstances of the case, he was guilty of contributory negligence in going onto appellant's track, — and of this we express no opinion, — we do not think appellee would be liable if the driver did not, in fact, discover appellant in time to have prevented him from being run over. Such failure was no more than ordinary negligence.

In paragraph 13, the court, after charging that if by failure of the street-car company to employ skillful and prudent drivers, any one is injured, that the company is liable, further charges that the fact that a driver might have been at other times careless or imprudent would not render the company liable in this action, unless on the occasion of the injury sued for such driver was careless, reckless, or imprudent. While the proposition embodied in this charge may be sound logic, still it is argumentative, and improper to be given in charge to a jury by a court.

The evidence was conflicting as to whether the driver was negligent on this occasion, and his negligence on a former occasion, if such was proven, was a circumstance to be considered by the jury, with the other evidence in the case, in determining his negligence. Parties are, under the laws of this state, entitled to have juries consider all evidence submitted to them without any suggestion or comment whatever from the court. The statute contemplates that such legal propositions, and such only as are applicable to the facts of the case, should be submitted by the court to the jury, in language and terms suited to their capacity, and the jury

should be left to determine the facts, unbiased by any intimation of the court as to the weight of the evidence.

A number of rulings in reference to the admission and rejection of testimony are assigned as erroneous, but it is not deemed necessary to notice any, except two. The court, over an objection that the evidence was immaterial and did not confine the investigation to the occasion of the injury, permitted defendant to prove that other boys than the plaintiff had been in the habit of jumping on the cars and rocking and scaring the mules. The objection should have been sustained. The testimony was clearly inadmissible, and was calculated to distract the attention of the jury from the true issues of the case. During the progress of the trial, plaintiff offered in evidence the boot worn by him at the time he was injured, for the purpose, as stated by counsel to the court, of exhibiting the indentations made thereon, for the inspection of the jury, as tending to show that the car-wheel ran over the plaintiff's foot, and that the brake was not applied; there being other evidence before the jury tending to show that when the brakes are applied a car-wheel will not revolve on its axle, but will slide along on the ground. The boot and indentations were excluded on an objection for immateriality. In this there was error. Physical facts are always admissible, and when the object itself can be brought into court and exhibited, it is more satisfactory than a description of it by witnesses that have inspected it outside of court.

For the errors indicated, we think the judgment should be reversed, and the cause remanded.

THERE CAN BE NO RECOVERY FOR INJURY SUSTAINED BY PLAINTIFF where his concurring negligence proximately contributes thereto, unless the defendant, after becoming aware of the plaintiff's danger, or his exposure thereto, neglects to use a proper degree of care, and the injury is the direct result of such omission: *Hurt v. St. Louis etc. R. R. Co.*, 94 Mo. 255; 4 Am. St. Rep. 374; and see *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521; *Delaware etc. R. R. Co. v. Cadow*, 120 Pa. St. 559; 6 Am. St. Rep. 730; *Wichita etc. R. R. Co. v. Davis*, 37 Kan. 743; 1 Am. St. Rep. 275; *Cincinnati etc. R. R. Co. v. Long*, 112 Ind. 166.

COMPARATIVE NEGLIGENCE, doctrine of: See *Kerr v. Forgue*, 54 Ill. 482; 5 Am. Rep. 146. Where negligence of one party is great, and that of the other but slight, notwithstanding the slight negligence the party may recover: *Chicago etc. R. R. Co. v. Pondrom*, 51 Ill. 333; 2 Am. Rep. 306.

RICE v. MILLER.

[70 TEXAS, 613.]

SHERIFF IS PROTECTED IN MAKING LEVY under a writ of attachment valid and regular, and it is his duty to make the levy, however full his knowledge may be of the insufficiency of the cause of action on which the writ issued, or of the wrongful and malicious intent of the party in suing out the writ.

DEFENDANT IN ATTACHMENT WRONGFULLY SUED OUT, THOUGH THERE WAS NO ACTUAL SEIZURE of his property, if the levy was such as to place it in the custody of the law, is entitled to recover such actual damages as result to him from being virtually dispossessed of his property during the time the levy was continued in force, and if there was malice in issuing the process, he is entitled to recover exemplary damages.

William W. Flood, for the appellant.

S. B. McBride, for the appellee.

GAINES, A. J. The appellant brought this suit against appellees Miller and Wright, and the other appellees as sureties on the official bond of Wright, as sheriff of Clay County, to recover damages for an alleged wrongful suing out and levy of an attachment and wrongful seizure of a certain stock of horses belonging to him. The petition, among other averments, alleged that defendant Miller brought two suits against him, one in Wichita and another subsequently in Wilbarger County, upon a pretended judgment rendered against him in Iowa, in a suit in which there was no service upon him, and in which he neither appeared nor answered; and at the same time sued out attachments in each of them, upon the grounds "that he was about to move his property out of the state, without leaving sufficient remaining for the payment of his debts." It also averred that the attachments were placed in the hands of Wright, as sheriff of Clay County, and were levied upon a stock of horses belonging to plaintiff, "as they ran in their range in Clay County"; that at the time of the levy he was about to drive the horses to market, but was prevented by the levy from doing so for twenty days. It also alleged that at the end of this time he removed the horses to Caldwell, Kansas, but that one Herron, a deputy under Wright, followed him, took possession of the horses, and drove them back into the Indian Territory for fifty days. It is not shown that the attachments had been released when the horses were removed. It is further alleged that Miller knew that he had no cause of action against the plaintiff; that plaintiff was not about to remove

his property out of the state without leaving a sufficiency to pay his debts, as was known to Miller; that the attachments were sued out wrongfully and maliciously, for the purpose of injuring and harassing the plaintiff, and that Wright knew all these facts. The petition also alleged actual damages, and claimed a recovery therefor against all the defendants, as well as for exemplary damages against Miller and Wright. Wright and his sureties filed a joint demurrer to the petition, and Miller demurred separately. Both demurrers were sustained, and plaintiff declining to amend, the suit was dismissed.

We are of opinion that there was no error in sustaining the demurrer of defendant Wright and his sureties. The writs of attachment were valid and regular, and protected the sheriff in making the levy. However full his knowledge may have been of the insufficiency of the cause of action, or of the wrongful and malicious intent of Miller in suing out the attachments, it was his duty to make the levy. As we construe the petition, no actual possession was taken of the horses before plaintiff Rice removed them to Kansas; but the levy was made under article 2293 of the Revised Statutes, by an indorsement upon the writ and notice to the defendant therein. The property, nevertheless, was in the constructive possession of the officer by the levy of the writ, and it became his duty to prevent their removal, and if removed without his knowledge, to pursue and recapture them. For any loss that resulted to plaintiff by the seizure of the horses after he had driven them off, he cannot recover. This was a lawful result from his own wrong, for which he has no cause of action.

But as to the demurrer of defendant Miller, we think the court was in error. If the allegations of the petition were true, the attachment was both wrongfully and maliciously sued out. The effect of the levy, though there was no actual seizure of the horses, was to take them from the control of the plaintiff, and he is entitled to recover such actual damages as resulted to him by being virtually dispossessed of his property during the time the levy was continued in force, provided he can show that the writs were wrongfully issued. If there was malice in issuing the process, he would be entitled to recover exemplary damages, and these are laid at a sufficient sum to give the court jurisdiction.

For the error in sustaining the demurrer of defendant Miller and in dismissing the suit, the judgment is reversed, and the cause remanded.

SHERIFF HAS NOTHING TO DO WITH PROPRIETY of process under which he acts, provided the court had jurisdiction, and the process is regular upon its face: *Keniston v. Little*, 30 N. H. 318; 64 Am. Dec. 297; and see *Porter v. Purdy*, 29 N. Y. 106; 86 Am. Dec. 283, and note 291; *Wadsworth v. Walliker*, 45 Iowa, 395; 24 Am. Rep. 788.

EXEMPLARY DAMAGES CAN BE AWARDED ONLY as a punishment when the injury inflicted was the result of the fraud, malice, gross negligence, or oppression of the defendant: *International etc. R. R. Co. v. Garcia*, 70 Tex. 207; and see *Irwin v. Yeager*, 74 Iowa, 175.

CITY NATIONAL BANK v. MARTIN.

[70 TEXAS, 643.]

BANKS AND BANKING. — IT IS NO PART OF BUSINESS OF BANK TO LOAN MONEY for the public or for individuals, and in the absence of proof that a bank was engaged in such business, it must be presumed that its teller, in making a loan of a customer's money, was acting outside of the scope of his authority as agent of the bank, and no liability attaches to the bank for the acts of its teller in making the loan.

BANK IS BOUND BY ACT OF ITS TELLER IN COLLECTING a note delivered to him as agent of the bank for collection, it being shown that he had on other occasions made collections for the bank, and the collection being made within the apparent scope of his authority.

KNOWLEDGE OF BANK-TELLER RELATIVE TO THE COLLECTION OF MONEY and the ownership of notes left with him for collection must be imputed to the bank, and notice to him is notice to the bank.

BANK HAVING HELD OUT ITS OFFICER TO THE WORLD AS WORTHY OF CONFIDENCE, it will not be permitted to profit by the frauds he may be thus enabled to perpetrate in the apparent scope of his employment.

EVIDENCE. — IF OBJECTION TO THE ADMISSION OF EVIDENCE is not shown by the record, it must be presumed that no objection was made.

ACTION against a bank to recover the amount collected by its teller on a note. The facts appear in the opinion.

Wray and Stanley, for the appellant.

Hogsett and Greene, for the appellee.

MALTBIE, P. J. John Nichols was the receiving and paying teller, also a director and vice-president of appellant, the City National Bank of Fort Worth, and died insolvent on the seventeenth day of August, 1885, a defaulter to the bank in the sum of thirty thousand dollars. During the year 1884, and up to the time of Nichols's death, the appellee, D. C. Martin, was a customer of the bank, and in the month of December deposited with it the sum of eighteen hundred dollars, Nichols receiving it for the bank. At the time of making

this deposit, Martin requested Nichols to assist him in making a loan of this money. In January, 1885, Martin called at the bank, and was informed by Nichols, who was then occupying his place as teller, that he had loaned fifteen hundred dollars of the money, and at the same time exhibited to Martin a note for that amount, signed by Boaz and Battle, payable to John Nichols or order, at appellant bank, indorsed by Nichols and others in blank. Martin directed Nichols to hold it for collection, the understanding of Martin being that Nichols was to hold the note in his capacity of agent of the bank. On the 27th of June, Boaz and Battle called on Nichols at the bank and gave him a check on the Traders' National Bank, payable to the order of appellant, for the sum of \$1,583.50, in payment of their note and accrued interest. This check was paid to the bank on the 29th. Nichols received the check from Boaz and Battle, and delivered their note to them. Nichols then made a deposit check in his own name for the amount of the check so received, and caused the same to be entered on the books of the bank to his individual credit. The bank never accounted to appellee for this note or the fifteen hundred dollars that Nichols claimed that he had advanced of appellee's money for the note. After these transactions had occurred, appellee, not knowing of them, authorized Nichols to extend the time of payment of the note till fall, upon payment of the interest. Soon after this Nichols represented to appellee that he had collected the interest and extended the time of the payment of the note. Appellee, upon the strength of these representations, drew several small drafts on the bank for the interest that he supposed had been collected on the note, which were paid by Nichols and suppressed without being reported to the bank. No officer of the bank except Nichols was informed of any of these matters; but appellee did not discover that there were irregularities about the transactions until after the death of Nichols. Upon this state of facts, the court rendered judgment in favor of appellee for the amount of the note and interest.

It is no part of the business of a bank to loan money for the public or for individuals, and in the absence of proof that appellant was engaged in such business, it must be presumed that Nichols, in making the loan of appellee's money, was acting outside of the scope of his authority as agent of the bank, and no liability would attach to the bank for the acts of Nichols in making the loan. In this case, the complaint is not in

reference to the making of the loan, but that the proceeds of the loan was appropriated by the bank to its own use after it had notice through Nichols that the money belonged to appellee. It is insisted, in the first place, that there is no competent evidence that the note in controversy was the property of appellee; and in the second place, it is insisted that if the note was shown to belong to appellee, that there is no evidence that appellant had notice of this fact, and that it had a right to apply the money in its possession to the credit of Nichols in payment of his defalcations. The declarations of Nichols at the time he exhibited the note to appellee were not objected to, so far as the record shows, and it must be considered by this court that no objection was made in the court below, though it is claimed in the brief of counsel that there was; and any objections that could have been made to the admission of the evidence must be held to be waived. Parties have the right to object or not, as they may see fit, to the admission of testimony that may be offered during the progress of a trial; if they fail to do so, the testimony is to be weighed by the court or jury, and such probative force should be given to it as it may be entitled to. Any other rule would lead to great confusion and uncertainty in determining causes upon appeal.

The question then is, Was the evidence sufficient to satisfy a reasonable mind that the note was the property of appellee? Nichols certainly knew to whom the note belonged. It was payable to his own order, and indorsed by himself in blank. The declarations of Nichols were corroborated by Boaz and Battle to the extent that at the time the loan was made, Nichols stated to them that the money belonged to an outside party; so there can be no doubt of the sufficiency of the testimony on that point. The note about which the declaration was made then being in the possession of Nichols, and payable to his order, the presumption was, that it belonged to him, and for that reason the declaration was against his interest when made, and he having competent knowledge of the subject, and having been shown to be dead, the evidence was admissible on this ground: 1 Greenl. Ev. 198, sec. 147. At the time of these declarations, appellant had no interest in the subject-matter, but its claim attached long subsequent thereto.

It clearly appears, from the testimony, that appellee was the owner of the note, and that he delivered it to Nichols as agent of the bank for collection. It was objected that Nichols had no authority to receive the note for collection in behalf of the

bank, his business as teller being to receive and pay out money over the counter. Let it be conceded that the duties of a teller, by the rules of banking, are thus limited. It was shown that Nichols, on other occasions, had made collections for the bank. But if it had not been shown, it is a well-acknowledged fact that the collection of money for others is a part of the regular business of all banks, and when a bank opens its doors for business with the public, and places officers in charge, persons dealing with them in good faith, and without any notice of any want of authority in such officer, and the act done is in the apparent scope of the officer's authority, whether the officer was actually clothed with such authority or not, the party so dealing would be protected: *Merchants' Bank v. State Bank*, 10 Wall. 650.

If a bank does not wish the public to deal with any particular one of its officers, at the regular place of business, in a particular line of that business, it would be its duty to so notify the public in some effectual way. The public certainly could not be expected to know, without being informed, that a person that was in the habit of daily receiving and paying out money, in sums great and small, had no authority to receive a note for collection, or receive the money for it when offered at the counter.

It may be that no one except the bill collector was authorized to make collections in this bank, or to receive notes for collection. Still, it would be most unreasonable that an ignorant third party, who had acted in good faith, should suffer in consequence of this rule. At the time Nichols received payment of the note in controversy, he was acting for appellant, in the apparent scope of his authority, and knew to an absolute certainty that the money belonged to appellee. The knowledge of Nichols, we think, under the circumstances, must be imputed to the bank; and, having held him out to the world as worthy of confidence, it would be monstrous to allow it to profit by the frauds that he was thus enabled to perpetrate. There is no doctrine of the law better settled than that a corporation or other person is liable for the frauds of its agents, perpetrated in the scope, or apparent scope, of their authority. If the bank had received the money without being chargeable with notice that it belonged to appellee, it might have been entitled to hold it; but such is not the case, and we think the judgment should be affirmed.

ACTS AND DECLARATIONS OF CASHIER binding on bank: *Houghton v. First Nat. Bank*, 26 Wis. 663; 7 Am. Rep. 107; *Cocheco Nat. Bank v. Haskell*, 51 N. H. 116; 12 Am. Rep. 67, and note 75; *Fishkill Sav. Inst. v. Nat. Bank*, 80 N. Y. 162; 36 Am. Rep. 595; *Corser v. Paul*, 41 N. H. 24; 77 Am. Dec. 753, and note 759.

PRESIDENT OF BANK WHO NEGOTIATES SETTLEMENT WITH INDORSER on matured paper held by his bank acts as the bank's agent, and whatever he does within the apparent scope of his authority to obtain the new security binds the bank which accepts and holds the security: *Cake v. Pottsville Bank*, 116 Pa. St. 264; 2 Am. St. Rep. 600.

BANK IS NOT RESPONSIBLE FOR FALSE REPRESENTATIONS made by a teller to induce a transaction not within the scope of the corporate powers of the bank: *Weckler v. First Nat. Bank*, 42 Md. 581; 20 Am. Rep. 95; compare *Security Bank v. Nat. Bank*, 67 N. Y. 458; 23 Am. Rep. 129.

NOTICE TO AGENT OF BANK INTRUSTED WITH MANAGEMENT OF ITS BUSINESS, or of a particular branch of its business, is notice to the bank in transactions conducted by such agent acting for it within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular transaction, or on some prior occasion: *Cragie v. Hadley*, 99 N. Y. 131; 52 Am. Rep. 9.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

ROLSETH *v.* SMITH.

[38 MINNESOTA, 14.]

NEGLIGENCE—PLEADING. — ALLEGATION OF NEGLIGENCE, as applied to the conduct of a party, is not a mere conclusion of law, but a statement of an ultimate fact properly pleadable.

COMPLAINT IN ACTION FOR DAMAGES FOR PERSONAL INJURIES, which alleges various things the defendant negligently and carelessly did, or omitted to do, and causing the injuries complained of, is not demurrable as not stating a cause of action, unless the particular acts or omissions complained of are such that they could not be negligent under any possible state of facts or circumstances provable under the allegations of the complaint.

CONTRIBUTORY NEGLIGENCE IS PURELY MATTER OF DEFENSE, which the plaintiff is not bound to negative in his complaint.

TO CONSTITUTE ASSUMPTION OR RISKS BY SERVANT, it is not necessarily enough that he knew, or ought to have known, the actual character and condition of the defective instrumentalities furnished for his use; but he must also have understood, or, by the exercise of ordinary observation, ought to have understood, the risks to which he is exposed by their use.

CONTRIBUTORY NEGLIGENCE. — COURT CANNOT SAY, AS MATTER OF LAW, that it appears from the allegations of the complaint that the plaintiff was guilty of contributory negligence, or had voluntarily assumed all the risks which concurred in causing his injury, unless these allegations so clearly show that fact that there could be no reasonable ground for different minds arriving at different conclusions upon the question, under any possible evidence admissible under the pleading.

Charles S. Jelley and Eugene G. Hay, for the appellant.

C. H. Benton, for the respondents.

MITCHELL, J. This action is brought to recover damages resulting from the alleged negligence of defendants, causing

injuries to the plaintiff while in their employment in their saw-mill. The appeal is from an order sustaining a demurrer to the complaint, on the ground that it does not state a cause of action. The defendants' contention is, that the complaint is insufficient, — 1. Because it does not allege anything that amounts to negligence on part of defendants; and 2. That it affirmatively appears that plaintiff himself was guilty of contributory negligence, or at least voluntarily assumed, as incident to his employment, all the risks of which he now complains.

The complaint, although very ingeniously framed, is in some respects so conspicuous for what it omits to allege, as well as for what it does allege, as to be suggestive of possible difficulty in establishing a cause of action by the evidence; yet we are of opinion that upon its face it is good. The question of negligence is one of mingled law and fact; and hence an allegation of negligence or carelessness, as applied to the conduct of a party, is not a mere conclusion of law, but a statement of an ultimate fact allowed to be pleaded: *Clark v. Chicago etc. R'y Co.*, 28 Minn. 69. The complaint in this case states various things which it alleges the defendants negligently and carelessly did or omitted to do, and which caused the injury complained of. Under this allegation, the plaintiff might prove any facts or circumstances not inconsistent with the particular facts alleged in the complaint, which would tend to prove this charge of negligence. Hence a court could not, as a matter of law, say that the complaint did not sufficiently allege negligence, unless the particular acts or omissions complained of are such that they could not be negligent under any possible state of facts or circumstances provable under the allegations of the complaint. When it is considered that the question whether a particular act is or is not negligent largely depends upon the surrounding circumstances, it would be impossible to say, in advance of the evidence, that the acts or omissions complained of in this case might not have been negligent. Perhaps a fair test of the sufficiency of the pleading in that regard is whether, under its allegations, evidence might be introduced sufficient to establish a cause of action. We are inclined to think that the learned court may not, in sustaining the demurrer, have given due weight to the allegation that these acts were negligent, or as to what facts or circumstances might be proved under it.

As to the question of contributory negligence, it must be

borne in mind that this is purely a matter of defense, which the plaintiff is not bound to negative in his complaint; also that to constitute an assumption of risks by a servant it is not necessarily enough that he knew, or ought to have known, the actual character and condition of the defective instrumentalities furnished for his use, but he must also have understood, or by the exercise of ordinary observation ought to have understood, the risks to which he is exposed by their use: *Russell v. Minn. & St. Louis R'y Co.*, 32 Minn. 230. This must be determined from all the facts and circumstances of the case. Hence a court could not say, as a matter of law, from the allegations of a complaint, that the plaintiff was guilty of contributory negligence, or had voluntarily assumed all the risks which concurred in causing his injury, unless these allegations so clearly show that fact that there could be no reasonable ground for different minds arriving at different conclusions upon the question, under any possible evidence admissible under the pleading.

While we think it affirmatively appears from the complaint that this was not a case of a master directing a servant under a pressing emergency, to engage in some extra-hazardous work outside of that which he had contracted to perform, but a voluntary change of work on part of the latter, yet we think the complaint does not affirmatively show any such conclusive state of facts as that supposed. We are therefore of opinion that the demurrer should have been overruled, and the defendants allowed to answer.

Order reversed.

NEGLIGENCE IS ORDINARILY QUESTION FOR JURY, but when the facts are uncontroverted, their legal effect is for the court: *Delaware etc. R. R. Co. v. Cadow*, 120 Pa. St. 559; 6 Am. St. Rep. 730, and note 732; *Wilson v. Louisville etc. R. R. Co.*, 85 Ala. 269; *Chatham v. Jones*, 69 Tex. 744.

SUFFICIENCY OF COMPLAINT ALLEGING NEGLIGENCE: *O'Connor v. Railroad Co.*, 94 Mo. 150; 4 Am. St. Rep. 364; *Hammond v. Schweitzer*, 112 Ind. 246; *Georgia Pac. R. R. v. Propst*, 85 Ala. 203; *Railroad Co. v. Harman*, 83 Va. 553.

CONTRIBUTORY NEGLIGENCE IS MATTER OF DEFENSE, and the burden of proving it rests upon the defendant: *Little Rock etc. R. R. Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230, and see note 240; *Little Rock etc. R. R. Co. v. Eubank*, 48 Ark. 460; 3 Am. St. Rep. 245; *Bogenschutz v. Smith*, 84 Ky. 330.

ASSUMPTION BY SERVANT OF RISKS INCIDENT TO EMPLOYMENT: *Woodward v. Shumpp*, 120 Pa. St. 458; 6 Am. St. Rep. 716, and cases collected in note 719; *New York etc. R. R. Co. v. Lyons*, 119 Pa. St. 324; *Criswell v. Railway Co.*, 30 W. Va. 798; *Craver v. Christian*, 36 Minn. 413; *Louisville etc.*

R. R. Co. v. Gower, 85 Tenn. 465. The servant is not bound, in all cases, to inform himself as to the safety of the premises or material to be used, as the master may have superior means of knowledge, and the circumstances may authorize the servant to rely upon him because of want of equal opportunity: *Bogenschutz v. Smith*, 84 Ky. 330.

McKINNEY v. HARVIE.

[38 MINNESOTA, 18.]

VENDOR AND PURCHASER — EVIDENCE. — INSTRUMENT SET FORTH IN COMPLAINT, ACKNOWLEDGING the receipt of a sum of money in part payment of a certain described lot, is not a contract for the sale or purchase of land, but a receipt only, subject to be explained and supplemented by evidence *aliunde*.

VENDOR AND PURCHASER — RECOVERY BACK OF PURCHASE-MONEY PAID BY PURCHASER. —Purchaser of land under a parol contract for the sale thereof, who repudiates the contract, and refuses to fulfill, is not entitled to recover an installment of purchase-money previously paid by him, if the vendor is willing, and offers to perform on his part, notwithstanding the contract is within the statute of frauds.

ACTION to recover back money paid on a contract for the sale of land. The facts appear in the opinion.

D'Autremont and Cheeseman, for the appellants.

White, Shannon, and Reynolds, for the respondent.

VANDEBURGH, J. The receipt set forth in the complaint as follows: "Received of F. W. McKinney one hundred dollars in part payment of lot seventy-six (76), block thirty-two (32), Duluth, Minn., third division," — and signed by defendant, was open to explanation, and the defendant was properly permitted to show the transactions connected with it, and that in the matter of the purchase of the lot the plaintiffs were acting as the agents of a third party, and paid the money for him. It is not a contract for the sale or purchase of land, and it is subject to be explained and supplemented by evidence *aliunde*. It is simply evidence of the payment of the sum of money specified for the particular object named: *Eighmie v. Taylor*, 98 N. Y. 288, 295; *Filkins v. Whyland*, 24 Id. 338; *Ryan v. Ward*, 48 Id. 204; 8 Am. Rep. 539; *Barickman v. Kuykendall*, 6 Blackf. 21, 24.

The evidence in the case tended to show that plaintiffs were

real estate brokers at Duluth, and on or about the eighteenth day of June, 1886, applied to appellant to purchase the lot in question, obtained his terms, and agreed by parol to take the lot at the price named by him, and paid him one hundred dollars, and took the receipt referred to; that this was done in contemplation of the purchase of the lot by a customer procured by them, one Chapman, with whom they had previously conferred, and who was expected to purchase it. Soon after, the parties were brought together, and it was mutually understood that the negotiations for the purchase were made for Chapman, who agreed to take the lot, and pay the price indicated. Afterwards, on or about July 15, 1886, plaintiffs prepared a deed in due form running to Chapman, and, at their instance, it was executed by defendant to be delivered to him, and left with them. Chapman subsequently refused absolutely to take the deed, and complete the purchase, though he made no objection to the title. Defendant's evidence also tends to show that he subsequently applied to the plaintiffs, and that they refused to take the lot, and referred defendant to Chapman. There is no evidence that Chapman at any time afterwards offered or was willing to pay for the property, and fulfill the agreement; on the contrary, he finally abandoned and repudiated it altogether; and it also expressly appears by the testimony of the plaintiff McKinney, who attended to the matter exclusively, that he never asked for a deed for himself, or offered to pay the purchase-money; and it does not appear that, after he disclosed that the purchase was made for Chapman, he made any claim that it was made for himself. The evidence also shows that plaintiffs, after Chapman refused the deed, sued him for their fees and expenses, including the one hundred dollars in question, which they alleged was advanced and expended by them for him as his agents in the premises, and recovered judgment therefor. Upon this evidence the jury were entitled to find that the plaintiffs were the agents of Chapman in the negotiations, and that the defendant was fully warranted in treating the latter as the principal in the transaction. The instructions upon this subject given by the court, as applied to the evidence, were substantially correct.

The following request of plaintiffs was refused: "That the defendant putting it out of his power to convey the lot to McKinney by a sale of the same to the church society, McKinney may treat the contract as rescinded, and recover back the

money paid as part consideration." But if, as the jury might find, and doubtless did find, McKinney was merely a broker negotiating for Chapman, whom he put forward as the purchaser, he has no right now to change his position, and claim the benefit of the alleged contract for himself. But this instruction was improper for another reason. The jury might find, upon the evidence, not only that defendant was not in default, and that Chapman was, and had forfeited all his rights under the alleged contract, and to recover any moneys paid thereunder, but there is evidence tending to show, also, a refusal on the part of the plaintiffs to take the property themselves. The defendant testifies, and it is not contradicted: "I went to plaintiff's office four or five times to see what he was going to do about it." And after Chapman refused to take the lot, he says: "I went to plaintiff and asked him if he was going to take that lot. He said: 'No; I have nothing to do with it. Go to Chapman.' This was three weeks after I had signed that deed. McKinney requested me to sign the deed at the time. I went then to close it up. I signed it at his request." And there was no subsequent offer or demand by the plaintiffs. It is true that, in October following, the defendant sold and conveyed the lot to a third party; but as he had given both principal and agent ample opportunity to take it under the agreement, and, as the evidence tends to show, both had notified them of their refusal, and the contract had been repudiated by them, he had done all that was reasonably necessary for his own protection. He was not obliged to hold the property always, but might, as he did, dispose of it after a reasonable time.

It is not material that the contract was by parol, and within the statute of frauds. The purchaser cannot recover moneys paid under it if the defendant was not in default. It was not his fault that it was not fulfilled, but wholly that of Chapman and the plaintiff. Under such circumstances the installment ought not, *ex æquo et bono*, to be recovered back: *Plummer v. Bucknam*, 55 Me. 105; *Gray v. Gray*, 2 J. J. Marsh. 21; *Coughlin v. Knowles*, 7 Met. 57, 62; 39 Am. Dec. 759; *Sennett v. Shehan*, 27 Minn. 328; *Ketchum v. Evertson*, 13 Johns. 359, 365; 7 Am. Dec. 384.

The affidavits disclosing the statements and admissions of a juror subsequent to the trial, and showing prejudice on his part, cannot be considered.

Judgment affirmed.

ACTION WILL NOT LIE TO RECOVER CONSIDERATION PAID UPON ORAL AGREEMENT for the purchase of lands, if the vendor is willing to fulfill: *Galway v. Shields*, 66 Mo. 313; 27 Am. Rep. 351; *Day v. Wilson*, 83 Ind. 463; 43 Am. Rep. 76; compare *Raub v. Smith*, 61 Mich. 543; 1 Am. St. Rep. 619.

CONTRACT FOR SALE OF LAND MUST BIND BOTH PARTIES, or it can bind neither: *Atlee v. Bartholomew*, 69 Wis. 43; 5 Am. St. Rep. 103; and see *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417.

NICOLLET NATIONAL BANK v. CITY BANK.

[38 MINNESOTA, 85.]

STATUTES. — WHERE LEGISLATURE OF ONE STATE ADOPTS STATUTE OF ANOTHER STATE, the construction of which has been judicially determined in the latter, a presumption arises, to be considered in connection with other principles of construction, that the legislature intended to adopt the statute with that settled construction.

BANKS AND BANKING. — MINNESOTA ACT OF 1881, prohibiting any banking corporation created under the laws of that state from making loans or discounts on the security of the shares of its own capital stock, is effectual to prevent such corporation from having a lien upon the stock, as security for such a loan or discount made subsequent to that enactment, notwithstanding a by-law of the corporation adopted prior to that statute had provided for such a lien.

ALTHOUGH SHARES OF STOCK IN BANKING CORPORATION ARE BY STATUTE MADE TRANSFERABLE only on the books of the bank, yet as between the immediate parties an assignment without such transfer is effectual, and will be recognized and enforced, at least in equity, as against all parties not showing a superior right.

ASSIGNMENT BY STOCKHOLDER OF SHARES OF BANK STOCK, made for the purpose of collateral security, and although made without a transfer on the books of the bank, as required, is effectual as against the bank, asserting a lien for a debt of the stockholder, contrary to the provisions of statute; and the refusal of the bank, because of such asserted lien, to make the proper transfer on its books, subjects it to liability to the assignee in an action for damages as for the conversion of the stock.

ATTACHMENT OF SHARES OF BANK STOCK BY BANK, after notice of an assignment of the shares, made without a transfer on the books of the bank, is ineffectual to defeat the prior right of the assignee.

Smith and Reed, for the appellant.

Woods, Hahn, and Kingman, for the respondent.

DICKINSON, J. The defendant, a banking corporation created under the laws of this state, adopted a by-law in 1872, embracing the provisions that no transfer of the stock should be made, without the consent of the directors, by any stockholder who should be liable to the bank, either as principal debtor, or otherwise, and that stock should be assignable only

on the books of the bank. In 1884, the defendant bank issued to one Kelley stock certificates, which bore upon their face the statement that the stock was transferable only on the books of the bank, and that it was not transferable by any stockholder liable to the bank as principal debtor, or otherwise, without consent of the board of directors. In 1886, Kelley, who was then indebted to the defendant bank, without the consent of the defendant's directors, assigned and delivered to the plaintiff his stock certificates as security for a debt then contracted. This debt being still unpaid, the plaintiff notified the defendant of the indebtedness and assignment. After this the defendant, in an action against Kelley upon his indebtedness, attached the interest of Kelley in this stock; after which the plaintiff, producing to the defendant and offering to surrender the stock certificates, demanded that the proper transfer be made on the books of the bank, which was refused. This action was then commenced to recover the value of the stock.

The defendant asserts a lien upon the stock for the indebtedness of Kelley, and claims that whatever rights the plaintiff acquired by the assignment or pledge were subject to that lien. It is asserted that the by-law, in terms charging the stock with a lien in such cases, was authorized by the statute in force at the time the by-law was adopted. This law (Gen. Stats. 1878, c. 33, sec. 14) was as follows: "The shares in such bank are personal property, and transferable on the books of the bank in such manner as may be agreed upon in the articles organizing such bank, or prescribed in its by-laws; and every person becoming a stockholder therein shall, in proportion to his interest, succeed to all the rights and be subject to all the liabilities of prior stockholders." In view of the construction and effect which must be given to a later enactment (Laws 1881, c. 77), which was passed before the issuing of this stock to Kelley, we deem it unnecessary to determine what, independently of this later act, might have been the force of the earlier statute, and of the by-law referred to.

By the act of 1881, a new section was added to the prior banking law, designated section 48, which is: "No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within

six (6) months from the time of its purchase, be sold or disposed of at public or private sale." This is an exact transcript from section 35 of the national banking act of June 3, 1864 (13 U. S. Stats. at Large, 110; U. S. R. S., sec. 5201), and was undoubtedly intended to be, as it is, a copy of that part of the congressional act. More than ten years before we thus incorporated this provision in our statute, the federal statute had been authoritatively construed by the supreme court of the United States in *Bank v. Lanier*, 11 Wall. 369. It was there held that a pledge of stock to a bank by a stockholder as security for obligations in the nature of a debt was a violation of the thirty-fifth section of the act of 1864. It was also considered by the court that the claim of the bank of a lien upon the stock, apart from any special agreement, was also opposed to the law of 1864, although a by-law, authorized by the act of 1863, under which the bank had been organized (but which was repealed by the act of 1864), provided for such a lien. Again, in 1873, in *Bullard v. Bank*, 18 Id. 589, it was decided, following *Bank v. Lanier*, *supra*, that a national bank organized under the act of 1864 could not acquire a valid lien upon the shares of its stockholders for money loaned, even by express provision therefor in its articles of association and its by-laws. This, as the opinion shows, was deemed to be within the prohibition of the thirty-fifth section of the act. In 1871 and 1874, the courts of New York, Maine, and Kentucky were called upon to follow these decisions of the supreme court of the United States as to the effect of section 35 of the act of 1864: *Conklin v. Second Nat. Bank*, 45 N. Y. 655; *Hagar v. Union Nat. Bank*, 63 Me. 509; *Second Nat. Bank v. Nat. State Bank*, 10 Bush, 367. It is further to be noted that section 12 of the congressional act of 1864 contains, in substance, the same provisions as section 14 of our general statutes above cited, and upon which the defendant places some reliance.

It is a well-recognized principle that, where a statute, the construction of which has been judicially determined, has been adopted into the statute law of another state, a presumption arises, which, however, should be considered in connection with other principles of construction, that the legislature adopted the statute with that settled construction: *In re St. Paul & N. P. R'y Co.*, 37 Minn. 164; *Cooley's Constitutional Limitations*, 52, and cases cited. There is no reason in the circumstances of this case to oppose the applicability of this

rule of construction, or to weaken its force. But even without regard to this, it seems to us impossible to place any other construction upon the act of 1881 than that which gives to it the effect of prohibiting a bank from loaning money to a stockholder upon the security of its own capital stock. To make such a loan, upon an express agreement that the stock should be held as security, would be plainly opposed to the statute. In the absence of such a special agreement, it would be equally opposed to the letter and spirit of the act that the bank should have a lien upon the stock, as security for such a loan, by force of any by-law adopted by it, or by legal implication.

It was within the power of the legislature, by general law, to declare such a prohibition, which should be effectual as to future transactions, notwithstanding any regulation or by-law of the corporation to the contrary. The matter in question is one of public concern, affecting the permanent solvency of banking corporations, created as well to subserve public interests as for the benefit of the members (*Bank v. Lanier, supra*); and the manner in which they may conduct their business is not beyond such legislative control as may be necessary for the protection of the public. The by-law alone was ineffectual to oppose proper legislative control, by general law, and as to future transactions. To justify construing a statute for the creation of corporations as authorizing the adoption of by-laws of such a nature as to place the control of matters of public concern wholly within the power of the corporation, and excluding the future exercise of ordinary legislative functions, would at least require language admitting of no other reasonable meaning. The provision in section 14 of the statute above recited, authorizing corporations to prescribe by by-law the manner of transferring stock, does not involve any such bargaining away, or self-deprivation of legislative authority.

The assignment to the plaintiff, without a transfer on the books of the bank, did not constitute a complete transfer in merely legal contemplation, so as to effect an actual substitution of share-holders binding upon the corporation. But, as between the immediate parties to the transaction, the assignment was effectual, and would be recognized and enforced, at least in equity, as against all parties not showing a superior right: *Baldwin v. Canfield*, 26 Minn. 43; *Black v. Zacharie*, 3 How. 483, 513; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Dickinson v. Central Nat. Bank*, 129 Mass. 279; 37 Am. Rep.

351; *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365; 32 Am. Rep. 315. The asserted lien of the defendant upon the stock, being illegal, did not oppose the acquisition by the plaintiff of the rights here asserted.

The prior claim of the plaintiff must be allowed to prevail over the attachment of the defendant, the latter having actual notice of the facts: 1 Morawetz on Corporations, 2d ed., secs. 196-199, and cases cited; Jones on Pledges, 179. What would be the result if there had been no such notice, it is unnecessary to consider.

Although the assignment to the plaintiff was for the purpose of collateral security, the plaintiff was entitled to have the same entered on the books of the bank: Cook on Stocks, sec. 466, and cases cited; Colebrooke on Collateral Securities, sec. 273.

The refusal of the defendant to make the proper entry on its books, upon an unjustifiable assertion of a superior lien upon the stock in its own favor, subjected it to liability in an action for damages, and under such circumstances the value of the stock affords the measure of the recovery: 1 Morawetz on Corporations, sec. 217; Cook on Stocks, secs. 576, 581; *Kortright v. Buffalo Commercial Bank*, 20 Wend. 91; 22 Id. 348; 34 Am. Dec. 317; *Blanchard v. Dedham Gas Light Co.*, 12 Gray, 213; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306; *Wyman v. Am. Powder Co.*, 8 Cush. 168; *Pinkerton v. Manchester & L. Railroad*, 42 N. H. 424; *German Union Building Ass'n v. Sendmeyer*, 50 Pa. St. 67; *Baltimore etc. R'y Co. v. Sewell*, 35 Md. 238; 6 Am. Rep. 402; *Bank of America v. McNeil*, 10 Bush, 54; *McMurrich v. Bond Head Harbor Co.*, 9 U. C. Q. B. 333. See also *Baker v. Marshall*, 15 Minn. 136, 177.

The rights of the plaintiff in making the pledged securities available were not confined to a sale of the stock, encumbered as it was by the refusal of the bank to complete the transfer to the plaintiff.

Judgment affirmed.

WHEN STATUTE HAS RECEIVED KNOWN AND AUTHORITATIVE JUDICIAL CONSTRUCTION, and is substantially re-enacted, the legislature is presumed to adopt such construction: *Woolsey v. Cade*, 54 Ala. 378; 25 Am. Rep. 711.

LEGAL TITLE TO SHARES OF CORPORATE STOCK, ASSIGNABLE ONLY ON BOOKS OF CORPORATION, does not pass by an assignment of the shares which is neither made nor recorded on the books of the corporation: *Lippitt v. Am. Wood Paper Co.*, 15 R. I. 141; 2 Am. St. Rep. 886, and note 891. But no

record is required to perfect the transfer of stock, unless so provided by the charter or by-laws of the corporation: *Sayles v. Bates*, 15 R. I. 342.

ATTACHMENT OF STOCK WITHOUT NOTICE OF ASSIGNMENT TAKES PRECEDENCE THEREOVER, when the assignment is not perfected on the books of the corporation: *Fort Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270; 60 Am. Rep. 789; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752.

SAWYER v. MINNEAPOLIS AND ST. LOUIS R'Y Co.

[88 MINNESOTA, 108.]

RAILROADS — NON-LIABILITY FOR INJURY TO EMPLOYEE OF ANOTHER COMPANY. — The plaintiff was injured by reason of a defect in one of the defendant's freight-cars, but at the time of the injury was not in the defendant's service, but in that of another company then using the car in its own business. The car had been sent over the road of the latter company, which connects with that of the defendant, consigned to a point in another state; but on its return it was transferred beyond the point of junction at which it should have been returned to the defendant, and was loaded with freight consigned to a distant point on such connecting road. The plaintiff was injured while attempting to ascend the ladder of the car, a round of which was defectively attached. Under this state of facts, the defendant owed the plaintiff no duty in respect to the condition of the car growing out of contract, or otherwise, and could not be held liable in this action for the injury so sustained by the plaintiff.

ACTION for the recovery of damages for injuries sustained by reason of a defect in one of the defendant's freight-cars. The facts appear in the opinion. The plaintiff appealed from an order granting a new trial.

Lusk and Bunn, for the appellant.

B. S. Lewis, for the respondent.

VANDEBURGH, J. One of defendant's cars was loaded with plaster at Fort Dodge, Iowa, and transported over its line to Waseca, in this state, a point of junction with the Winona and St. Peter railroad. It was consigned to Alma Centre, in Wisconsin, a station on the Green Bay railroad, and was thereupon transferred and taken over the two last-named roads to its place of destination. On its return trip it was reloaded with freight (emigrant movables), and consigned to Huron, Dakota, over the Winona and St. Peter railroad and Chicago and Northwestern road. The car was sent out from Waseca, March 15, 1886, and passed through the same place on its return, April 8th. Huron is 260 miles west of Waseca. The car arrived at Tracy, a point on the Winona and St. Peter road, 135 miles west of Waseca, on the evening of the last-named

day. Winona, Waseca, and Tracy are division stations, where trains are made up, and cars inspected, and repairs made. A new train was made up at Tracy for Huron, including the car in question, and the same evening the plaintiff, a brakeman in the employ of the Chicago and Northwestern Railroad Company, was injured while attempting to ascend the ladder of the car. As he took hold of the second round, it pulled off, and he was thrown between the cars and seriously hurt. The car was repaired and returned empty, billed from "Huron to Winona," but stopped at Waseca on April 13th, and was then returned to the defendant. The evidence tends to prove that the round which broke loose had not been securely or properly attached to the body of the car, and that apparently when repaired, it had been fastened with a screw, which was fixed in or beside a piece of wood, which in process of time ceased to hold it firmly, and the ladder had become unsafe.

At the time of the accident, it is clear that the car was not in the service of the defendant. There is no evidence that its use beyond and west of Waseca was authorized by defendant. And though railway companies, for convenience or by reason of the urgency of their business, not unfrequently make such use of foreign cars, or cars from connecting lines belonging to other companies, when they get possession of them, yet the evidence fails to show any general custom from which an authority can be implied to retain or divert such cars to a special or general use in their own business, further than is necessary or proper on their return to the place or point of junction whence they may have been taken. The evidence shows that while, from the nature of the case, it is difficult to prevent such use of cars, yet that the owners object to it, and that it is considered "an abuse of a car" to retain it and use it in the business of the bailee on its own lines further than is reasonably necessary in returning it. If the defendant had seasonably regained control of the car, it may be presumed that it would have inspected and repaired the same in due course. It is evident that its liability could not continue indefinitely for defects which might be developed from the faulty construction of cars kept out of its use.

At the time of the accident, the car was under the management and control of the company operating it, and not of the defendant. It did not come to the hands of the plaintiff through the agency or by the authority of the defendant, and there is no privity between them. It owed him no duty

growing out of contract, and was not bound to furnish him safe instrumentalities. As to the defendant, the plaintiff was a mere stranger: *Winterbottom v. Wright*, 10 Mees. & W. 109; *Loop v. Litchfield*, 42 N. Y. 351, 358; 1 Am. Rep. 543; Thompson on Negligence, 227, 237.

There is a class of actions in tort which are maintained on the ground that the wrongful acts or omissions on the part of the defendant are such as are in themselves imminently dangerous to others, and from which a general liability arises to any one for injuries which can be traced as the natural and probable consequences of such acts: *Thomas v. Winchester*, 6 N. Y. 397, 402; 57 Am. Dec. 455, and cases cited; *Smith v. New York etc. R. R. Co.*, 19 N. Y. 127; 75 Am. Dec. 305. But this case evidently does not belong to that class, and the defendant owed no such general duty to the plaintiff, or others not in privity with it: *Kahl v. Love*, 37 N. J. L. 5; *Longmeid v. Holliday*, 6 Ex. 761; *Collis v. Selden*, L. R. 3 Com. P. 495. The liability of the defendant in respect to the condition of its cars did not extend beyond those to whom it owed some duty by reason of its relation to them as master, employer, or carrier. Any other rule would be found impracticable of application in ordinary business operations: *Thomas v. Winchester*, *Kahl v. Love*, *supra*. A new trial was properly granted.

Order affirmed.

TO ESTABLISH LIABILITY OF ONE PERSON FOR NEGLIGENCE OF ANOTHER, the relation of master and servant must be shown to exist between them: *Palmer v. Village of St. Albans*, 60 Vt. 427; 6 Am. St. Rep. 125, and cases collected in note 133.

LIABILITY OF LESSOR OF RAILROAD FOR NEGLIGENCE OF LESSEE: *Nugent v. Railroad Co.*, 80 Me. 62; 6 Am. St. Rep. 151, and note 162.

IN RE CUNNINGHAM.

[88 MINNESOTA, 169.]

REVOCATION OF WILL MAY BE ESTABLISHED BY PROVING A SUBSEQUENT WILL containing a clause revoking all former wills, although the later will has been lost or destroyed, and no part of its contents other than the clause of revocation can be proved.

EVIDENCE TO OPPOSE THE PROBATE OF A WILL may consist of proof of a revocatory clause in a later will which has been lost or destroyed, and can never be established as a will so as to be admitted to probate.

Kellogg and Eaton, for the appellant.

Charles C. Willson, for the respondents.

DICKINSON, J. A will of Robert Cunningham, executed in 1877, having been offered for probate in the probate court of Olmsted County, was, upon proper proceedings in that court, allowed as the last will and testament of the deceased. The contestants, Rachel C. Somerville and others, who had opposed the probate of the will, appealed to the district court. Upon the trial of the appeal in that court, after the proponent had shown the execution of the will, the contestants introduced evidence, which was received against the proponent's objections, of the execution of a later will, executed in 1884, and containing a clause expressly revoking all former wills. The court, finding that the execution of this later will had been established by the evidence, and that the will of 1877 had been thereby revoked, reversed the determination of the probate court; whereupon judgment was entered declaring the earlier will to have been revoked by the later, and that it was not the last will and testament of the deceased. The proponent appealed to this court.

The later will of 1884 was destroyed by the testator at a subsequent date; but at that time the testator was not mentally competent to make or revoke a will, so that his act was in a legal point of view ineffectual. Assuming, what the evidence tended to disclose, that the contents of the later will in respect to the disposition of the property of the testator were unknown, and could not be fully established, the preliminary question is suggested whether, in such a case, the revocatory clause alone being shown, that would be effectual as a revocation of the former will, or would that clause fail to have effect because the will could not be executed in the disposition of the estate? It may, of course, be that the testator would not have revoked a former will except for the purpose of having his intentions as to his property as declared in the later will carried into effect. But the speculations of a court as to the undisclosed reasons and the full purposes of the testator cannot be allowed to control, as against the certain, unequivocal act and declaration of the testator, whereby he did revoke, as he had a right to. Such a revocation is in general effectual, although the will cannot otherwise be executed: *Com. Dig., tit. Estates by Devise, Revocation, F, 1*; *Quinn v. Butler*, L. R. 6 Eq. 225; *Tupper v. Tupper*, 1 Kay & J. 665; *Wallis v. Wallis*, 114 Mass. 510; *Jones v. Murphy*, 8 Watts & S. 275-300; *Price v. Maxwell*, 28 Pa. St. 23; *Hairston v. Hairston*, 30 Miss. 276; *Gossett v. Weatherly*, 5 Jones Eq. 46; *James v. Marvin*, 3 Conn.

576. There are some limitations to this rule, which are not applicable here, since this will was properly executed, and, so far as appears, capable of being legally carried into effect according to its terms, were it not for the uncertainty in respect thereto arising from its subsequent destruction.

But the point more strenuously urged is, that the evidence of the execution of the later will, with its revocatory clause, was inadmissible to oppose the probate of the former will, for the reason that the revocatory writing had never been established as a will by the probate court. This position is supported by some decisions and *dicta* in Massachusetts: *Laughton v. Atkins*, 1 Pick. 535; *Stickney v. Hammond*, 138 Mass. 116; *Sewall v. Robbins*, 139 Id. 164. But the general rule in that state, excluding such evidence, is deemed inapplicable when the later will is itself incapable of being admitted to probate by reason of its having been lost or destroyed, so that its whole contents cannot be clearly proved. In such case, the revocatory clause being shown, it is admissible in evidence in opposition to the probate of a former will: *Wallis v. Wallis*, 114 Mass. 510. Other courts have held to the admissibility of such evidence without qualification: *Nelson v. McGiffert*, 3 Barb. Ch. 158, 164; 49 Am. Dec. 170; *Stevens v. Hope*, 52 Mich. 65; *Barksdale v. Hopkins*, 23 Ga. 332; *Rudy v. Ulrich*, 69 Pa. St. 177; 8 Am. Rep. 238.

In accordance with the weight of authority, and as is considered by the majority of the court with the better reason, we hold this evidence to have been competent in proof of an act of revocation. The testator might effectually revoke his former will by a writing so declaring, and executed as this instrument was executed (Gen. Stats. 1878, c. 47, sec. 9), as he might also by other means. According to almost all of the authorities in Massachusetts, as well as elsewhere, such an instrument, its proper execution being shown, would be equally valid as a revocation, whether it might or might not (by reason of its contents being unprovable) be allowed as a will disposing of the estate. We are unable to recognize any reason for the rule that such an act of revocation is not competent evidence (upon the issue whether a prior instrument offered for probate was still in force as the testator's will at the time of his death) until, if it be capable of having effect as a will, it be first allowed as such in the probate court. Whatever may be said as to the expediency of a court proceeding with the trial of the issue presented by the propound-

ing of an instrument for probate when it is discovered that a later instrument has been executed which ought to be submitted for probate, it is considered that the later revocatory will (its proper execution being shown) is not subject to the objection that as evidence it is incompetent, irrelevant, or immaterial.

The case shows no other substantial grounds for the assignments of error, and the judgment is affirmed.

WILL CANNOT BE ADMITTED TO PROBATE, if there is proof that a later will was executed, containing a clause revoking the former one, although the later will has not been, and cannot be, admitted to probate, because no evidence of its contents can be produced other than the revocatory clause: *Nelson v. McGiffert*, 3 Barb. Ch. 158; 49 Am. Dec. 170.

REVOCATION OF WILL, WHAT IS: Note to *Gains v. Gains*, 12 Am. Dec. 377-380; and note to *Pickens v. Davis*, 45 Am. Rep. 342-344.

ROSENBAUM v. ST. PAUL AND DULUTH R. R. Co.

[38 MINNESOTA, 178.]

COMMON CARRIERS. — PRESUMPTION OF LAW IS, THAT PERSON RIDING ON CONSTRUCTION TRAIN, BY PERMISSION of an employee of a railway company, is not lawfully thereon; but this presumption may be overcome by special circumstances, as where, for instance, the company is in the habit of allowing its employees to ride on such trains to and from their work or their homes.

PERSON RIDING ON CONSTRUCTION TRAIN IS DEEMED TO CONSENT TO and to accept all the usual incidents to such a train running over a side-track constructed in the usual way. But if, through failure of the company to spike the rails, or neglect to keep the track in suitable repair for the temporary purposes for which it was constructed and used, an injury occurs to one lawfully on the train, without fault on his part, he may recover.

ACTION for damages for personal injuries sustained in the defendant's service. The material facts appear in the opinion. The defendant appealed from an order refusing a new trial.

James Smith, Jr., and O'Brien and O'Brien, for the appellant.

Propping and Markham, for the respondent.

VANDEBURGH, J. 1. The presumption of law is, that persons riding on construction trains, and not employed in actual service thereon, or in connection therewith, are not lawfully there, and if permitted to be there by the employees of the

company, the presumption is against their authority to bind the company: *Waterbury v. New York etc. R. R. Co.*, 17 Fed. Rep. 671; *Prince v. International etc. R'y Co.*, 64 Tex. 144. But this presumption may be overcome by special circumstances, as where, for instance, the company is in the habit of allowing its employees to ride on such trains to and from their work or their homes. In the case at bar, the company was engaged in repairing its track. Separate companies of men were employed about the work. Some were engaged in loading the cars at the gravel-pit; others accompanied the cars, and unloaded the gravel along the track, and others were graders, engaged in ballasting the track. The plaintiff belonged to the third class. The men so employed were all boarded and lodged at the boarding-cars of the defendant, stationed on a side-track, and they were daily transported on the construction train to and from the boarding-place and their work. And there was a side-track near the boarding-cars, about five hundred feet long, upon which the construction train, which was made up of flat-cars, was run when it came to the boarding-car.

The plaintiff was in the habit of being so carried, with others, daily. On the day in question, when the alleged injury occurred, the train brought plaintiff and others engaged in the same work in the middle of the afternoon to the camp, and they were notified that they were not required to go out again to work that afternoon. He had left his coat at the place where he worked, and he thereupon rode back on a train loaded with gravel to get it, in company with the men who were unloading the cars, and with the consent of the conductor in charge of the train, who knew that he was not there to help unload the cars. The train came up to the camp from the south, when plaintiff got on board to go for his coat, and when it came back to the camp for the day, with plaintiff and other employees, it was run over the side-track, where the accident complained of occurred.

Under these circumstances, we do not think that the plaintiff ought to be considered a trespasser on the train, or that the defendant owed him no duty in respect to the condition of its track. It was the established practice of the company to transport employees, including the plaintiff, on this train every day. He was still an employee, though not working at that time, and was riding with others engaged in the same general employment. In view of the fact that these em-

ployees were all permitted to ride daily, and that the train was under the general direction and management of the conductor, who also had general charge of the work and the men, it should be held to be fairly within his reasonable discretion to allow the plaintiff to ride, under the circumstances of this case. The plaintiff, therefore, having no knowledge of any rule forbidding the conductor to grant such permission, might presume such authority from the nature of the business and the manner in which it was conducted. It may be a question whether the instructions of the court in this case were in all respects strictly accurate, but as no exceptions were taken to the charge, we need not consider such instructions. The defendant's first and second requests were properly refused, because their effect was to take the case from the jury. The court was right in refusing the third and fourth requests, and charging in lieu thereof "that, if the conductor was forbidden to carry passengers upon the train at the time in question, the plaintiff could not recover for the injury, unless the circumstances for which the company was responsible were such as to lead the plaintiff, as a reasonable man, to understand that he had such authority." The question was for the jury, upon the evidence in the case.

2. The negligence complained of was solely in respect to the condition of the side-track. The court charged the jury, at the defendant's request, that if plaintiff knew the manner in which the side-track was constructed, he assumed the risk necessarily incident to such construction. In riding on this train, he consented to and accepted all the usual incidents to such a train. He cannot recover for injuries resulting from the condition of the side-track, if the same was constructed in the usual way, though the grade was imperfect or uneven, and the track unballasted. But if through failure to spike the rails, or neglect to keep it in suitable repair for the temporary purposes for which it was constructed and used, an injury occurred to one lawfully on the train, without fault on his part, he would be entitled to recover: *Shoemaker v. Kingsbury*, 12 Wall. 369; *Hazard v. Chicago, B., & Q. R. R. Co.*, 1 Biss. 503. The defect complained of by the plaintiff arose chiefly from the fact that the rails were not properly spiked to the ties. The evidence on this question was properly received, and the determination of the trial court thereon must be considered as final.

Order affirmed.

THOUGH RAILWAY CAR IS NOT OPERATED FOR PURPOSE OF CARRYING PASSENGERS, yet if a person takes passage therein by the invitation of servants in charge thereof, they thereupon become bound to operate the train in such manner as due care and caution would suggest for his safety: *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510, and note 523, 524. Thus where one is received by a railroad as a passenger on its freight train, the same degree of care is due him that the road owes to its passengers on its regular trains, except that in taking the freight train he accepts and travels on it, acquiescing in the usual incidents and conduct of a freight train managed by competent and prudent men: *McGee v. Mo. Pac. R. R. Co.*, 92 Mo. 208.

SLOGGY v. DILWORTH.

[88 MINNESOTA, 179.]

NUISANCES. — ONE WHO ERECTS AND MAINTAINS A NUISANCE IS LIABLE TO SUCCESSIVE ACTIONS for damages resulting from its continuance, and he cannot release himself from such liability by a conveyance of the premises. But this liability ceases with his death, and a cause of action does not survive against his legal representatives for damages arising from the continuance of the nuisance subsequent to his death.

EVERY CONTINUANCE OF NUISANCE OR RECURRENCE of the injury is an additional nuisance, forming in itself the subject-matter of a new action.

NUISANCES — LIABILITY OF HEIR. — ON DEATH OF ANCESTOR, RIGHT OF POSSESSION OF REALTY IS IN HEIR or devisee until the personal representatives assert their right and take possession by virtue of the statute. And the heir or other person succeeding to the possession can only be made liable after notice and request to abate a nuisance existing on the premises, unless, with knowledge of its character, he has actively interfered, or contributed to injuries resulting therefrom.

NUISANCES — DAMAGES. — IF SURFACE WATER IS WRONGFULLY TURNED UPON THE LAND OF ANOTHER, as the result of the joint acts of several parties, each may be sued for the entire damage; but if the damage caused is the combined result of the acts of several, acting independently, each is liable in proportion to his contribution to the nuisance, and not otherwise.

ACTION to recover damages for the destruction of the plaintiff's crop of grain. The facts appear in the opinion. The defendants appealed from an order refusing a new trial.

R. R. Briggs, for the appellants.

Frank D. Larrabee, for the respondent.

VANDEBURGH, J. In the year 1883 Joseph Dilworth, defendants' testator, owned sections 1 and 35, mentioned in the complaint, and one C. P. Sloggy, the husband of plaintiff, owned the northwest quarter of section 2, lying next adjoining on the south to the southwest quarter of section

35, and west of section 1, the northeast quarter of section 2 intervening. The line between sections 2 and 35 is the boundary line between the towns of Moorhead and Oakport. During the same year Dilworth caused to be constructed the ditches and embankments described in the complaint on the boundary lines between sections 1 and 2, and 2 and 35. Such embankments constituted and were intended for a road-bed or highway, with ditches on each side,—the ditches between sections 1 and 2 running north into the east and west ditches, which ran along the north line of Sloggy's land, and beyond into a large drain which extends to the river. Sloggy had notice at the time of the construction of these ditches, and the next year transferred the land in question to the plaintiff, his wife, and has since acted as her agent in the management of it. In January, 1885, Joseph Dilworth, who was a non-resident, died, and in March following, his will was admitted to probate at Pittsburgh, in the state of Pennsylvania, and the defendants duly qualified as executors. This action is brought to recover damages resulting from the destruction of plaintiff's crops upon her land in the year 1885, alleged to have been caused by the overflow of the surface water gathered into the ditches dug by defendants' testator, as above described. No other or further acts of the deceased or his representatives are complained of than those above mentioned; that is to say, the ditches and embankments were made in 1883, and have since so remained. The action, then, is for consequential and special damage from flowage in 1885, and not for trespass and direct injuries to the premises then owned by plaintiff's husband in 1883.

1. Whether the latter licensed the excavation and embankment upon his own land, we think was a question for the jury, and was determined by their verdict.

2. The verdict also determined that the effect of the ditches was to turn the water gathered from the low lands lying east of plaintiff's premises upon her land in unnatural quantities, to her damage, and resulting in the injury to her crops complained of.

3. The rule as laid down in *Dorman v. Ames*, 12 Minn. 347 (451), and supported by the great weight of authority, is, that the originator of a nuisance remains liable to successive actions for damages resulting from the maintenance thereof: *Plumer v. Harper*, 3 N. H. 88; 14 Am. Dec. 336, 338; *Prentiss v. Wood*, 132 Mass. 486; *McDonough v. Gilman*, 3 Allen, 264;

80 Am. Dec. 72; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143; 82 Am. Dec. 201.

4. He who erects a nuisance is liable for the damages arising from the erection, and also for the continuance thereof. The erection may of itself cause no injury, though an action may be proper, in order to assert a right or prevent a threatened injury. But special damage may subsequently arise from its continuance, and so, while but one action can be maintained for its erection, repeated actions may be brought for its continuance: *Staple v. Spring*, 10 Mass. 72. And the originator is deemed to uphold and maintain it (as well as those claiming under him) while it is suffered to be continued, and is accordingly liable for damages, and he cannot release himself from his duty to remove it by his voluntary deed. But this liability must cease with his death. A cause of action growing out of the erection or continuance of a nuisance in his lifetime will, by virtue of the statute, survive against his legal representatives, but not for the maintenance thereof subsequent to his death. Here the *gravamen* of the action is for the continuance of these ditches after Dilworth's death, and during plaintiff's occupancy. She sues for the special damages caused by the flowage complained of. She does not claim damages for the erection of the alleged nuisance, or for the direct injury to the freehold. The cause of action for which this suit was brought did not arise until the actual damage in question occurred, and the statute of limitations commenced to run from that time, and not earlier: 2 Greenl. Ev., sec. 433; *Delaware and Raritan Canal Co. v. Wright*, 21 N. J. L. 469; Gould on Waters, secs. 412, 414. Every continuance of the nuisance or recurrence of the injury is an additional nuisance, forming in itself the subject-matter of a new action: *Duryea v. Mayor*, 26 Hun, 120. And it cannot be presumed that a nuisance will be continued, or the injuries repeated: *Dorman v. Ames*, *supra*; Gould on Waters, sec. 420. Had Dilworth lived, he might not only not have continued but might have removed the cause of the injury complained of.

5. The cause of action in this case, then, clearly arose after the death of Joseph Dilworth, and his representatives are not liable in this action by reason of any act of their testator. The plaintiff, however, in her complaint rests her claim upon the acts of the deceased; and there is no allegation or proof that the defendants, personal representatives, had taken pos-

session, or that they were cognizant of the condition of the premises, or the danger likely to arise from the continuance of the ditches, or in any way authorized or connected themselves therewith. They are not, therefore, liable: *Inhabitants of Oakham v. Holbrook*, 11 Cush. 299. On the death of the ancestor, the right of possession of the realty is in the heir or devisee until the personal representatives assert their right and take possession by virtue of the statute: *Noon v. Finnegan*, 29 Minn. 418. And the heir or other person succeeding to the possession could only be made liable after notice and request to abate a nuisance existing on the premises, unless, with knowledge of its character, he has actively interfered or contributed to injuries resulting therefrom: 1 Addison on Torts, 60; Angell on Watercourses, sec. 403; *Plumer v. Harper*, *supra*; *Thornton v. Smith*, 11 Minn. 1 (15.) It was only by virtue of the statute (Gen. Stats. 1878, c. 77, sec. 1) that an action for damages occurring in the lifetime of the ancestor survived against his legal representatives. Upon his death, plaintiff was obliged to resort to the proper notice, or a suit to abate or restrain the continuance of the alleged nuisance, or such other proceedings as she might be advised, to prevent a threatened injury. He was liable to plaintiff's grantor for any damages arising from the trespass and the construction and maintenance of the ditches, including permanent injuries, until the transfer of the land by the latter. And upon his conveyance thereof to plaintiff, Dilworth became liable to her for the damage done by the continuance thereof by him to the time of his death, as he cannot be said to have continued them thereafter: *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143; 82 Am. Dec. 201; Gould on Waters, sec. 385. Otherwise, since repeated actions may be brought for recurring injuries arising from the continuance of a nuisance, and the statute of limitations does not cut them off unless a prescriptive right has attached (*Prentiss v. Wood*, 132 Mass. 486), such actions might be maintained successively for the same cause against both the heir and the executors. In *Chenango Bridge Co. v. Lewis*, 63 Barb. 111, cited by plaintiff's counsel, the action was for damages done in the lifetime of the testator, and for tolls received for nine years before his death, or by the company of which he was a stockholder, and the liability might have been extended against his executors for the receipt of tolls after his death. The case, we think, is not in conflict with the views we have expressed.

6. The defendants — foreign executors — voluntarily appeared, and agreed to litigate this action as defendants, in order to determine the question of their liability as the personal representatives of the deceased. The stipulation for this purpose is somewhat ambiguous; but it is obvious that its object was simply to consent to come in as defendants and litigate the case upon the merits, without any proceedings in the probate court here to establish the will, or for the appointment of executors in this state, both as respects the legal liability of the deceased or themselves as his executors, upon the alleged cause of action set forth in the complaint. Upon the case as presented, it is clear, we think, that the plaintiff failed to establish such liability.

7. It appears that only a part of the surface water which caused the damage complained of came from the land naturally drained by the ditches constructed by the deceased, but that, after his death, other persons, of their own motion, opened a connection with the ditch on the west side of section 1, opening into a slough lying east of that section, which had filled up with water in consequence of heavy rains, and thereby the flow of water in the Dilworth ditches was so much increased as to cause the flooding of plaintiff's land to the extent complained of. Upon these facts the defendants, if liable at all in the action, would only be liable for the proper proportion of the damages caused by them. If waters are wrongfully turned upon the land of another as the result of the acts of several parties, they are all liable. It is no defense that the injury caused or wrong done by any one, standing alone, might not be a sufficient ground of complaint. If the damage caused is the combined result of several acting independently, recovery may be had severally in proportion to the contribution of each to the nuisance, and not otherwise: 1 Addison on Torts, *364; Gould on Waters, secs. 222, 278, 398; *Sellick v. Hall*, 47 Conn. 260; *Brown v. McAllister*, 39 Cal. 573; *Chipman v. Palmer*, 77 N. Y. 51; 33 Am. Rep. 566. If, however, they are acting jointly in the premises, then they may be jointly or severally sued for the entire damage. So if the defendants had agreed, consented to, or acquiesced in the joint use of these ditches as a common outlet for the drainage of their own and the lands lying east and beyond, the rule adopted by the court making them liable for the entire damages sustained by the plaintiff might have been sustained; but as applied to the facts in this case, it was erroneous.

Order reversed.

PARTY WHO ACQUIRES TITLE TO PREMISES ON WHICH NUISANCE EXISTS BECOMES LIABLE to other persons injured by the continuance of the nuisance after due notice to remove it, but not before such notice: *Nichols v. City of Boston*, 98 Mass. 39; 93 Am. Dec. 132; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91; *Conhocton Stone Road v. Railroad Co.*, 51 N. Y. 573; 10 Am. Rep. 646; *Slight v. Gutzlaff*, 35 Wis. 675; 17 Am. Rep. 476.

IN ACTION FOR NUISANCE AGAINST SEVERAL ACTING INDEPENDENTLY in polluting a stream by the discharge of sewerage from the premises of each, each is liable only to the extent of the separate injury committed by him: *Chipman v. Palmer*, 77 N. Y. 51; 33 Am. Rep. 566.

DAMAGES FOR NUISANCE: See *Ellis v. American Academy of Music*, 120 Pa. St. 608; 6 Am. St. Rep. 739; note to *Cooke v. England*, 92 Am. Dec. 628-631.

BAUSMAN v. KELLEY.

[38 MINNESOTA, 197.]

MORTGAGES. — FORECLOSURE OF MORTGAGE BY ADVERTISEMENT, AFTER DEATH OF MORTGAGEE, upon a notice of sale purporting to be by his authority, is a nullity, and cannot be made effectual by proof that the notice was in fact given by another person, who conducted the proceeding in good faith, and really in his own behalf.

IT IS ESSENTIAL QUALITY OF NOTICE THAT IT APPEAR to be given by competent authority, and a notice by a mere stranger can effect nothing.

MERE POSSESSION OF NOTE, AND MORTGAGE GIVEN TO SECURE IT, by a person other than the payee (and mortgagee) to whose order the note was payable, and the same being unindorsed by him, does not show ownership in such person.

MINNESOTA STATUTE, LAWS OF 1883, CHAPTER 112, INTERPOSING LIMITATION upon the right to avoid a statutory foreclosure of a mortgage, has no application to a case where the authority to exercise the power was wholly wanting, and where the notice and sale were wholly unauthorized, and not merely irregular by reason of some want of conformity with the statute.

ACTION TO REMOVE CLOUD UPON TITLE will lie by one out of possession against one in the actual possession of the land.

ACTION TO REMOVE CLOUD UPON TITLE IS NOT WITHIN the general statute of limitations, and barred by the lapse of six years, as being an action for relief on the ground of fraud.

COURT WILL NOT, IN ACTION TO REMOVE CLOUD UPON TITLE, GRANT equitable relief without regarding the equitable claims of the defendant, although the legal title is in the plaintiff. The latter cannot invoke equitable relief and at the same time insist that the court shall not regard any fact in the conduct or relations of the parties which may show his suit to be inequitable and against conscience.

IF IT IS SHOWN THAT DEFENDANT, IN ACTION TO REMOVE CLOUD UPON TITLE, PURCHASED the land in good faith, for value, under color of title, and without notice, and that he, with his grantors, had been in possession adverse to the real owner for a period of many years, he is entitled to the equitable protection of the court, unless the plaintiff, who had the legal title, was also without fault.

TO CONSTITUTE LACHES, THERE MUST HAVE BEEN KNOWLEDGE, actual or imputable, of the facts which should have prompted a choice either to diligently seek equitable relief, or thereafter to be content with such remedies as a court of law might afford, or if there was actual ignorance, that must have been without just excuse.

IF REAL OWNER OF LAND, KNOWING THAT THE RECORD IS MADE TO SHOW that his title has been divested, desires the aid of equity, he should seek it with reasonable diligence, and relief will be refused if, through his unreasonable delay, equities have intervened in favor of others.

CONTINUOUS ADVERSE POSSESSION FOR MANY YEARS IS TO BE PRESUMED as a fact known to the real owner of the land, which should put him upon inquiry, disclosing the source of the adverse claim, which he will also be presumed to have known. And if, under such circumstances, he remains inactive for many years, to the prejudice of innocent purchasers, he will not be entitled to relief in a court of equity. If in fact there was ignorance of the adverse possession, not only should that be made to appear, but it must be excused before the plaintiff would be entitled to relief.

Edward Savage, for the appellant.

Francis G. Burke and George M. Bennett, for the respondents.

DICKINSON, J. Action to remove a cloud upon title. We are called upon to consider the state of the title to the land in question, and the equitable rights of the parties. In December, 1855, Alexander Moore, who then owned a tract of 120 acres of land, including the lot here in controversy, executed to Joseph Hall, a resident of the state of New York, a mortgage upon the same, to secure the payment of \$277.37, with interest. It contained the usual power of sale. It was recorded at the time above stated. In the following year (1856) Moore conveyed the land by warranty deed to Jacob B. Bausman and Zenas E. Britton, the covenant respecting encumbrances containing an express exception as to the Hall mortgage. From those grantees the plaintiffs, by inheritance and by deeds of conveyance, have acquired the legal title, unless that was divested by proceedings under the mortgage. The defendant's claim is through the foreclosure of the Hall mortgage. That foreclosure is assailed upon the ground that the mortgagee, Hall, had died before the foreclosure proceeding was instituted. He died in June, 1865. About five years after his death, and in the year 1870, proceedings were instituted and completed for the foreclosure of the mortgage by a sale of the premises under the power. These proceedings were regular in form, and in accordance with the statute regulating such foreclosures. To the printed notice of sale were appended the names and designations, "Joseph Hall, mort-

gagee," and "R. B. Galusha, attorney for mortgagee." The sale appears to have been made to Galusha, and a record of the proceedings, proper in form, was completed. Galusha conveyed by warranty deed to one Taft in 1873, and by successive warranty deeds this apparent title as to the lot in question has come to the defendant, all of such deeds having been recorded. Some other facts will be referred to further on.

The foreclosure proceeding was wholly without authority, and void. The notice was of no legal effect. Hall, the mortgagee, being dead, could neither exercise the power of sale, nor confer authority upon another. A notice in his name and purporting to be by his authority could be of no legal effect. His name had no potency after he had ceased to exist: *White v. Secor*, 58 Iowa, 533. The offer to show that Galusha in fact had purchased the note and mortgage from one Lund, and that, not knowing of Hall's death, he conducted this proceeding in good faith, and really in his own behalf, was not material. In the first place, the offer did not go far enough to show that Galusha thereby acquired any interest in the note and mortgage. It was not assigned, and the note being unindorsed by Hall, to whose order it was payable, the mere possession by Lund did not show ownership: *Van Eman v. Stanchfield*, 10 Minn. 197 (255); 13 Id. 70 (75); *Hayward v. Grant*, 13 Id. 154 (165); 97 Am. Dec. 228. The mortgage was an incident to the note, and not the principal thing. The action of a mere stranger could have no effect: *Hayes v. Lienlokken*, 48 Wis. 509; *Miller v. Clark*, 56 Mich. 337. Again, the notice was not, upon its face, and did not purport to be, the act of Galusha, but of Hall, the mortgagee. It is an essential quality of a notice that it appear to be given by competent authority: *Niles v. Ransford*, 1 Id. 338; 51 Am. Dec. 95; *Roche v. Farnsworth*, 106 Mass. 509; and a notice which, upon its face, is declared to be the act of a designated person, and which, as such, would be void, cannot be made effectual by proof that it was really the act of another and undisclosed person, not even standing in a relation of privity with the person in whose name the notice was given. A notice by a mere stranger can effect nothing. It is unnecessary to consider whether the merely equitable assignee of a mortgage may foreclose the same, under the statute, in the name of his equitable assignor.

Anticipating here some facts referred to hereafter, we will say that the claim that the defendant, deriving his claim of

title through Galusha, is in the position of a mortgagee in possession cannot be sustained, for the reason just considered, that it does not appear that Galusha ever acquired any interest in the mortgage.

The defendant offered to prove that he was in the actual possession of the land; and it is claimed that in such a case an action of this nature will not be entertained in favor of the holder of the legal title. This position is sustained by very many authorities, but the rule was long ago established to the contrary in this state: *Donnelly v. Simonton*, 7 Minn. 110 (167); *Hamilton v. Batlin*, 8 Id. 359 (403); 83 Am. Dec. 787.

Again, it is contended that Laws of 1883, chapter 112, has interposed a limitation which bars this action. By the terms of that act, the sheriff's certificate of sale theretofore or thereafter made under a power contained in a mortgage is made *prima facie* evidence that all the requirements of law have been complied with, and of title in fee after the expiration of the time for redemption; "and no such sale shall be held invalid or set aside by reason of any defect in the notice thereof, or in the publication or posting of such notice, or in the proceedings of the officer making such sale, unless the action in which the validity of such sale shall be called in question be commenced, or the defense alleging its invalidity be interposed, within five years after the date of such sale." The act went into operation six months after its passage. Whatever may be the purpose and scope of this act, it cannot reasonably be construed as being applicable to a case where the authority to exercise the power was wholly wanting, and where the notice and sale were wholly unauthorized, and not merely irregular by reason of some want of conformity with the statute; otherwise any stranger to the mortgage and to the estate might acquire a title divesting that of the mortgagor by publishing an obscure notice of sale, subscribed by himself or in the name of the mortgagee, or without any signature or disclosed authority, and by causing a sale to be made thereunder, he becoming the purchaser. It cannot be that it was intended that in such a case the period of limitation prescribed by this statute (which, in respect to a past foreclosure proceeding, might be only six months) should be effectual to divest the landowner of his estate, regardless of the fact whether he knew of the fraudulent proceeding or not. In the case before us, there was more than a "defect" in the notice, and in the whole proceeding. In so far as it purported to be or was a notice, it

was the act of a dead man, and the real actor had no more authority to institute the proceeding than any stranger would have had. We do not think the act of 1883 is applicable.

The action was not, within the general statute of limitations, barred by the lapse of six years, as being an action for relief on the ground of fraud.

Are the plaintiffs chargeable with such laches that the peculiar remedies of a court of equity will be refused as against an innocent purchaser for value of an apparently valid title? It is contended on the part of the plaintiffs that the defense of a *bona fide* purchase without notice is not available as against the legal title, even in a court of equity; and this position is not without authority in its support. Both reason and the weight of authority are, however, to the contrary: *Bassett v. Nosworthy*, Finch, 102; 2 Lead. Cas. Eq. 1, and notes; *Phillips v. Phillips*, 4 De Gex, F. & J. 208, 216, et seq.; Bispham's Eq., sec. 264; 2 Pomeroy's Eq. Jur., secs. 740, 742, and cases cited. The principle upon which equity refuses to grant relief in such cases is equally applicable, whether the plaintiff has or has not the legal estate. He cannot invoke equitable relief, and at the same time insist that the court shall not regard any fact in the conduct or relations of the parties which may show his suit to be inequitable and against conscience. The defendant offered to prove that from a time a little subsequent to the conveyance from Galusha, in 1873, down to the time of the trial,—a period of some twelve years,—the successive grantees of this apparent title, including the defendant, had been in actual possession of this land; that they had all purchased for valuable considerations, without notice or knowledge of any fact invalidating the foreclosure proceedings, and that they had paid the taxes. This was rejected, for the reason, as appears from the written opinion of the learned judge filed with his decision, that while this would show the defendant to be entitled to the equitable favor of the court, the case did not show that the plaintiffs were chargeable with laches, and that hence the legal title must prevail. We concur in the view of the learned judge that these facts, if shown, would have entitled the defendant to the equitable protection of the court, unless the plaintiffs, who had the legal title, were also without fault, such as should prejudice their cause in a court of equity. We will, therefore, here assume that the facts were as indicated in the offer. The rejection of the evidence can only be justified

upon the theory that it could not have affected the result. An essential element in a case to constitute laches is, that the party whose delay is in question shall have been blameable therefor in the contemplation of equity; that he ought to have moved before, if he desired the peculiar and discretionary relief which courts of equity afford. There must, therefore, have been knowledge, actual or imputable, of the facts, which should have prompted a choice either to diligently seek equitable relief, or thereafter to be content with such remedies as a court of law might afford; or if there was actual ignorance, that must have been without just excuse: *Stocking v. Hanson*, 35 Minn. 207; 2 Pomeroy's Eq. Jur., secs. 809, 817, 965.

Whatever injurious consequences might naturally be anticipated as likely to result from delay must obviously be regarded in determining whether delay has been justifiable or culpable. A reason why equity discourages stale claims is based upon the consideration that the lapse of time has or may have been prejudicial by reason of the difficulty of proving the facts, or of the intervening of equities in favor of innocent persons, or perhaps from other causes. The policy manifested in our registry laws, to make the public records show the true state of the title to real property, has been such as to encourage purchasers to rely upon what the record discloses. That purchases of real estate are commonly made from those who appear to have the record title, without other inquiry than such as the records or the occupancy of the land may suggest, is a matter of common knowledge, of which no one can assume ignorance. Without deciding whether the real owner who has recorded his title is under any legal duty to act, if by the unauthorized and illegal conduct of another, the records are made to show that his title has been divested, we do say that he is placed in such a position that if, knowing the fact, he desires the aid of equity, he should seek it with reasonable diligence; and that relief should be refused, if, through his unreasonable delay, equities shall have intervened in favor of others. The continuous adverse possession of the defendant and his grantors for many years (we assume still what the defendant offered to prove) is to be presumed as a fact to have been known to the real owners of the estate: *McQuiddy v. Ware*, 20 Wall. 14. The divestiture of title by adverse possession rests upon this presumption of notice to the true owner of an open and hostile possession: *School District v. Lynch*, 33 Conn. 330, 334; *Turpin v. Saunders*, 32

Gratt. 27; *Samuels v. Borrowscale*, 104 Mass. 207, 210. The fact of unauthorized possession, being known, should have put the owners of this land upon inquiry, and inquiry would have certainly disclosed the foreclosure proceedings, and the apparently valid title thus acquired. This should have prompted such further investigation as might be necessary to determine the expediency of action. If, under such circumstances, those having the obscured legal title remain inactive for many years, suffering the apparently valid title and continued *indicia* of ownership to allure innocent purchasers, to their prejudice, it cannot be that, as against such purchasers, they are entitled to the favor and the discretionary aid of a court of equity. If in fact there was ignorance of the adverse possession, not only should that be made to appear, but it must be excused before the plaintiffs would be entitled to relief: *McQuiddy v. Ware*, *supra*.

Some other circumstances are pressed upon our attention, which, in connection with the alleged possession of the defendant and his grantors, are worthy of consideration, as having some bearing upon the question whether this action so tardily brought should be entertained with favor. We refer to the conduct of the plaintiffs, and those under whom they claim, which is relied upon by the defendant as going to show an abandonment of their interest in the land. We do not, at this time, pass upon the weight of this evidence, but only consider its legal bearing. There is evidence tending to show that this mortgage was paid in 1857, by the proceeds of another mortgage upon the same land for a larger amount than given, yet this mortgage was allowed to stand as an apparent lien upon the land for a period of thirteen years, and the apparent encumbrance was never discharged except as, by the foreclosure complained of, it became merged in the apparent title acquired under it. The neglect to pay the taxes, and the adverse possession since about 1873, have already been referred to. These things are important only as they may, with other circumstances, conduce to disclose the reason why these persons took no such interest in their property as to have induced some measure of prudence for its preservation from loss, and a more prompt effort to remove this cloud. If the real reason why this action was not brought years ago was, not because they were ignorant that their title had been clouded, but because they did not propose to redeem the land from its encumbrances, nor to attempt to protect and preserve their

estate, until after many years of neglect they changed their purpose upon discovering that the land had come to be of very great value, such a speculative course of conduct would afford a reason why their suit should not now be entertained as against innocent purchasers whose misfortune might be traced to that neglect. Even if the original owners were actually ignorant of the foreclosure and of the adverse possession, if that ignorance was attributable to the fact that they then proposed to abandon their property to whoever might acquire it under its encumbrances, or by tax title or otherwise, such neglect and indifference as to their own estate would constitute laches, especially as respects innocent purchasers. Nor would it be a sufficient answer for the original owners to say that they did not expect, and had no reason to expect, that their estate would pass from them in just this way by the foreclosure of this mortgage.

We are of the opinion that, in rejecting the evidence offered, the learned judge did not fully appreciate its effect as bearing upon the equities of the respective parties, and that there should be a new trial.

Ordered accordingly.

CLOUD ON TITLE, WHAT IS: *Holland v. Mayor etc.*, 11 Md. 186; 69 Am. Dec. 195, and note 201; *Arrington v. Liscom*, 34 Cal. 365; 94 Am. Dec. 722, and note 742; bill to remove cloud on title, when it will lie: *Munson v. Munson*, 28 Conn. 582; 73 Am. Dec. 693; *Polk v. Rose*, 25 Md. 153; 89 Am. Dec. 773; *Scott v. Onderdonk*, 14 N. Y. 9; 67 Am. Dec. 106, note 110; *Wetherell v. Eberle*, 123 Ill. 666; 5 Am. St. Rep. 574.

LEGAL TITLE TO LAND CANNOT BE TRIED IN SUIT TO REMOVE CLOUD from the title: *Fontaine v. Hudson*, 93 Mo. 62; 3 Am. St. Rep. 515.

LACHES AS BAR TO RELIEF: *Walet v. Haskins*, 68 Tex. 418; 2 Am. St. Rep. 501, and cases collected in note 505.

BYRNE v. MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY.

[33 MINNESOTA, 212.]

JUDGMENTS — RECORD OF FORMER ACTION AND RECOVERY AS EVIDENCE IN SUBSEQUENT ACTION. — In an action to recover damages for injuries resulting from a permanent obstruction of a watercourse, and the consequent overflowing of the plaintiff's land, the record of a former action and recovery for the same cause, for damages sustained prior to the commencement of this action, is properly admissible in evidence upon the same issues involved in both actions.

PROPER MEASURE OF DAMAGES FOR DESTRUCTION OR LOSS OF GROWING CROPS is in general the value of the crops standing upon the ground, and not the loss as measured by the rental value of the land.

"WATERCOURSE," IN LEGAL SENSE OF TERM, DOES NOT NECESSARILY CONSIST merely of the stream as it flows within the banks which form the channel in ordinary stages of water; and when, in times of ordinary high water, the stream, extending beyond its banks, is accustomed to flow down over the adjacent lowlands in a broader but still definable stream, it has still the character of a "watercourse," and the law relating to watercourses is applicable, rather than that relating to mere surface water.

FORMER RECOVERY FOR INJURIES RESULTING FROM NUISANCE DOES NOT BAR a recovery for subsequent injuries from a continuance of the same nuisance.

H. J. Peck, for the appellant.

J. B. Brisbin, for the respondent.

DICKINSON, J. In this action a recovery of damages is sought for the overflowing of the plaintiff's land in the years from 1881 to 1885, both inclusive, the cause of such injury being, as is alleged, the constructing and maintaining by the defendant of its railroad, so as to obstruct a natural watercourse (the Cannon River), which flows across the plaintiff's land. The obstruction complained of was not on the plaintiff's land. There had been a prior action between the same parties, and a judgment in favor of this plaintiff for injuries resulting from the same cause during several years prior to 1881. The court properly received in evidence the record of the former action and recovery. It was evidence of the plaintiff's title, which was put in issue by the defendant in both actions. It was also admissible upon the question whether the railroad had been so constructed as to obstruct the natural flow of the stream, which was also in issue in both actions.

In general, the proper measure of damages for the destruction or loss of growing crops is the value of the same standing upon the ground, and not the loss as measured by the rental value of the land: *Lommeland v. St. Paul etc. R'y Co.*, 35 Minn. 412; *Folsom v. Apple River Log Driving Co.*, 41 Wis. 602. This general rule of damages was properly applied in this case, the plaintiff having been prevented, by the acts complained of, from securing the crop of hay upon the meadow land belonging to his farm. The case is readily distinguishable in several respects from that of *Brakken v. Minnesota and St. Louis R'y Co.*, 29 Minn. 41, and 31 Id. 45, in which case there was no destruction or loss of property. We see no rea-

son to doubt that the actual loss of the perennial crop of grass was susceptible of being proved and measured with reasonable certainty. Whether the damages might have been measured also by the diminution in the rental value, if the case had been presented upon that theory, we need not determine.

The case in part was, that outside of the proper banks of the stream, the defendant had constructed an embankment across the bottom-land below the plaintiff's land (by the course of the stream). The banks of the stream are low, and at times of high water they are overflowed, and the plaintiff's meadow-land submerged. It is shown that before the building of the embankment the overflow passed off in that direction in the course of a few days, but since that time it has remained upon the plaintiff's meadow, so as to prevent the harvesting of the grass. As the evidence presents the case, the embankment "held the water back." The rulings and charge of the court were to the effect that this overflow was in the nature of a watercourse, rather than of mere surface water, and that the defendant had no right to so construct its embankment over the bottom-land as to obstruct the passage of the water. The facts shown justify the rulings and charge of the court. A "watercourse," in the legal sense of the term, does not necessarily consist merely of the stream as it flows within the banks which form the channel in ordinary stages of water. When, in times of ordinary high water, the stream, extending beyond its banks, is accustomed to flow down over the adjacent lowlands in a broader but still definable stream, it has still the character of a watercourse, and the law relating to watercourses is applicable, rather than that relating to mere surface water: *Crawford v. Rambo*, 44 Ohio St. 279. What might be the rule of law with respect to water setting back from a stream upon adjacent lowland, but not passing over it as running water, we do not determine. We do not understand this to be such a case. The former recovery for injuries resulting from the obstruction in prior years did not bar this action for subsequent injuries from the continued nuisance.

Order affirmed.

PUNITIVE DAMAGES FOR CONTINUANCE OF NUISANCE may be given by jury in an action brought after a former recovery by the plaintiff against the defendant: *Ellis v. American Academy of Music*, 120 Pa. St. 608; 6 Am. St. Rep. 739.

THOUGH MEASURE OF DAMAGES FOR DESTRUCTION OF GROWING GRASS caused by wrongfully overflowing land is the value of the grass at the time of the overflow, yet if the use of the land for pasturage and the growth of grass is thereafter prevented, that fact may be considered as an element of damage: *Sabine etc. R. R. Co. v. Broussard*, 69 Tex. 617.

IF LAND IS WRONGFULLY OVERFLOWED, AND THE OWNER THEREBY DEPRIVED OF ITS USE, the true measure of damages is its fair rental value, and not the contingent profits of crops which might have been raised on it had it not been overflowed: *City of Chicago v. Huenerbein*, 85 Ill. 594; 28 Am. Rep. 626.

NATURAL WATERCOURSE, DEFINITION OF: *Bloodgood v. Ayers*, 108 N. Y. 400; 2 Am. St. Rep. 443, and cases collected in note 446. A stream does not cease to be a watercourse, and become mere surface water, because, at certain points, it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel: *West v. Taylor*, 16 Or. 165.

WAKEFIELD v. BROWN.

[38 MINNESOTA, 361.]

JUDGMENTS—STAY OF EXECUTION.—TIME DURING WHICH EXECUTION IS STAYED by the court, at the instance of the judgment debtor, must be excluded from the computation of the five years after entry of judgment allowed by the Minnesota statute for enforcing it.

DEEDS.—IF TRUE OWNER OF LAND CONVEYS BY ANY NAME, the conveyance, as between the grantor and grantee, will transfer title, although the grantor executed the deed of conveyance under an assumed name, or the scrivener who draughted the instrument made a mistake in his christian name, and evidence *aliunde* the instrument is admissible to identify the actual grantor.

ACTION of ejectment. The opinion states the case.

Smith and Reed, for the appellants.

Ueland, Shores, and Holt, for the respondents.

MITCHELL, J. The defendants claim title to the premises in dispute under a sale on execution, issued October 9, 1863, on a judgment rendered and docketed May 13, 1857, against one George E. H. Day. An execution was issued on this judgment May 15, 1857. On July 8, 1857, the judgment debtor obtained from the court an order staying all proceedings under the judgment, and the execution issued thereon, until the further order of the court, and directing the sheriff to return the execution immediately, which he did, stating that he returned it unsatisfied by order of the court. This stay continued in force until October 21, 1858, when the parties stipulated that the answer of the defendant (which it

would seem he had been allowed to interpose) should be withdrawn, and the judgment theretofore entered remain and stand as the judgment of the court, and that, in consideration of the premises, execution should be stayed for one year from November 1, 1858. A second execution was issued May 26, 1862, and returned "No property found," July 28, 1862. A third execution was issued October 9, 1863, which was the one on which the sale was made.

The statute applicable to the case was Revised Statutes of 1851, chapter 71, section 80 (Pub. Stats. 1858, c. 61, sec. 80), as amended by Laws of 1862, chapter 27, which is, that "the party in whose favor judgment is given may, at any time within five years after the entry thereof, proceed to enforce the same as provided by statute; but when no execution shall have been issued and levied, or returned 'No property found,' within five years from the time of the entry of judgment, the lien of the judgment shall be determined, and the property of the judgment debtor discharged therefrom." The contention of the plaintiffs is, that the return of the first execution unsatisfied by order of the court was not, within the doctrine of *Sherburne v. Rippe*, 35 Minn. 540, sufficient, under this statute, to preserve the lien of the judgment; and, the second execution having been issued more than five years after the entry of the judgment, consequently the lien of the judgment had terminated before the issuing of the execution on which the sale was made. On the other hand, defendants urge that, inasmuch as no formal levy upon real estate is necessary, as has been repeatedly held by this court, therefore the issuing and placing the first execution in the hands of the sheriff was a sufficient compliance with the statute to preserve the lien of the judgment; that this point was not covered by the assignments of errors, and hence not considered or passed upon by this court in *Sherburne v. Rippe*, *supra*.

Passing this point, we are clearly of opinion that it must be held that the lien of the judgment was in life at the time of the issuing of the third execution, in October, 1863, upon the ground that the time from July 8, 1857, to October 21, 1858, during which execution was stayed by the court at the instance of the judgment debtor, must be excluded from the computation of the five years allowed by the statute. If so, then, of course, the second execution was issued and returned in time to preserve the lien of the judgment. At common law, the right to sue out an execution in a personal action was

limited to a year and a day from the entry of judgment. If the party had slipped his time, he was put to his action upon the judgment. This limitation of the common law was as inflexible and as positive as that of our statute; yet it was well established at common law that when the plaintiff had judgment with stay of execution, or execution was stayed by injunction, the plaintiff might sue out an execution within one year after the stay terminated, or the injunction was dissolved. On the same principle, if the defendant brought a writ of error, and thereby hindered the plaintiff from taking his execution within a year, and the plaintiff in error was nonsuited or the judgment affirmed, the defendant in error might proceed to execution after the year, without *scire facias*, because the writ of error was a *supersedeas* to the execution, and the plaintiff must acquiesce until he hears the judgment above. The reason for this is, that the stay of execution being with the consent and for the benefit of the judgment debtor, and the injunction or writ of error being his own act, he should not take advantage of them, nor could he be surprised or prejudiced by the delay, because that delay was in fact referable to himself. It would be unreasonable and inconsistent for the law to present to a party, in one hand, a command to do an act within a certain time, under the penalty of losing his rights, and with the other hand restrain him from doing the act. For this reason, the time during which the plaintiff was thus prevented by the law from issuing execution was, at common law, excluded from the year allowed for that purpose: 3 Bac. Abr., tit. Execution, H, 724; *Hutsonpiller v. Stover*, 12 Gratt. 579; *Michell v. Cue*, 2 Burr. 660; *United States v. Hanford*, 19 Johns. 173; *Noland v. Seekright*, 6 Munf. 185. Analogous in principle are those cases in which the courts have frequently made exceptions to the operation of statutes of limitation, though exceptions for such causes were not provided for in the statutes; as, for example, the period during which an administrator or executor is exempted from suit; when the right to sue an administrator has been suspended by reason of an appeal from the order appointing him; the time during which the courts have been shut by war; or the period during which the plaintiff has, by the defendant, been prevented by injunction from bringing suit. The limitation of the statute of the right to issue execution to five years is strictly analogous to the common-law limitation of a year and a day. The only change is one of time. In enacting such a

statute, it is not to be presumed, notwithstanding its general terms, that the legislature intended to ignore or change the common-law rules for the computation of time under the limitation. On the contrary, in the absence of express provisions to the contrary, it is to be presumed that they enacted the statute with reference to these rules, and that they intended them to continue to apply.

We are strongly inclined to the opinion that, under the stipulation of the parties of October 21, 1858, the case stood precisely as if the plaintiff in the action had obtained judgment with a stay of execution, and hence that the period of the stay under the stipulation, as well as the stay under the order of the court, should be excluded. If so, the execution under which the sale was made was issued in time, without regard to the two previous ones. But however this may be, we are clear that the time the stay under the order of the court continued in force should be excluded. It follows that the execution sale was valid, and transferred to the purchaser all the interest in the premises which Day had in them.

That he owned one undivided half is undisputed. Whether he owned the other half depends upon the existence and validity of a conveyance thereof to him by one John O. Brunius, the previous owner. There was introduced in evidence the record of a deed thereof to Day, executed April 4, 1857, in the body of which the grantors are described as James O. Brunius and Bertha, his wife. The signatures to this deed are "J. O. Brunius" and "Bertha Brunius," and in his certificate of acknowledgment, the officer certifies that James O. Brunius and Bertha, his wife, personally came before him and acknowledged the execution of the instrument. Parol evidence was offered and admitted to prove that John O. Brunius and wife were the parties who in fact executed this deed. It is unnecessary to repeat this evidence, or to refer to it further than to say that, if competent, it, in our opinion, conclusively proves that John O. Brunius was the identical person who executed this deed. Either he executed it under the assumed name of James O. Brunius, or, which is more probable, the scrivener who drew the deed made a mistake in the christian name of the grantor, who signed himself "J. O. Brunius," a name by which he was also often known. It is immaterial which of these hypotheses is the correct one; for in either case, there can be no question, either upon reason or authority, that if he in fact executed and delivered this instrument

as his deed, it was effectual, as between the grantor and grantee, to convey the title. If the true owner conveys by any name, the conveyance, as between the grantor and grantee, will transfer title, and in all cases evidence *aliunde* the instrument is admissible to identify the actual grantor. The admission of such evidence does not change the written instrument, or add new terms to it, but merely fixes and applies terms already contained in it: 3 Washburn on Real Property, 281; *Hommel v. Devinney*, 39 Mich. 522; *Nixon v. Cobleigh*, 52 Ill. 387; *Lyon v. Kain*, 36 Id. 362, 369; *Middleton v. Findla*, 25 Cal. 76, 81; *Fallon v. Kehoe*, 38 Id. 44; 99 Am. Dec. 347; *Staak v. Sigelkow*, 12 Wis. 234; *Morse v. Carpenter*, 19 Vt. 613; *Fletcher v. Mansur*, 5 Ind. 267; *Janes v. Whitbread*, 11 Com. B. 406, 411; *Elliot v. Davis*, 2 Bos. & P. 338. In the present case, there is no question of innocent purchasers. It stands precisely as if the controversy was between the original parties to the deed.

Judgment affirmed.

WHERE OWNER OF LAND EXECUTES DEED THEREOF TO FICTITIOUS GRANTEE, and then, under the name of such grantee, executes another deed of the same land to another person, the latter gets good title: *David v. Williamsburgh etc. Ins. Co.*, 83 N. Y. 265; 38 Am. Rep. 418.

PERSON WHO APPEARS BEFORE MAGISTRATE AND DULY ACKNOWLEDGES EXECUTION OF DEED, to which his name was subscribed by another in his absence, thereby recognizes and adopts the signature as his own: *Bartlett v. Drake*, 100 Mass. 174; 97 Am. Dec. 92; 1 Am. Rep. 101.

KNIGHT v. ALEXANDER.

[38 MINNESOTA, 384.]

ACTION TO DETERMINE ADVERSE CLAIM TO LAND MAY BE MAINTAINED by one in possession thereof, without other proof of his interest in the land.

TAXATION. — DESIGNATION OF NEWSPAPER FOR PUBLICATION OF DELINQUENT TAX LIST, named in a resolution of the board of county commissioners the "Enterprise," sufficiently designates the "Glencoe Enterprise," there being no other newspaper published in the county bearing that name, and being in common speech spoken of as the "Enterprise."

DESCRIPTION IN PUBLISHED DELINQUENT TAX LIST as follows: "N $\frac{1}{2}$ N E $\frac{1}{4}$ S E $\frac{1}{4}$ N E $\frac{1}{4}$ N E $\frac{1}{4}$ of N W $\frac{1}{4}$ section 23, township 114, range 30, 160 acres," is not a sufficient description of the north half of the northeast quarter, the southeast quarter of the northeast quarter, and the northeast quarter of the northwest quarter of that section. In such a publication a description which is in fact erroneous, and which is calculated to mislead, is legally insufficient as constructive notice.

E. S. Alexander, for the appellant.

M. O. Little, Hooker, Little, and Nunn, and F. R. Allen, for the respondent.

DICKINSON, J. The plaintiffs, alleging their ownership and possession of the land in controversy, brought this action under the statute to determine the adverse claims of the defendant. The latter asserts a title in himself, acquired under a tax judgment entered in 1880. The land in question is in the county of McLeod, and described as the north half of the northeast quarter, the southeast quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 23, township 114, of range 30. The evidence justified the finding of the plaintiffs' possession of the land, and that was sufficient to enable them to maintain this action: *Herrick v. Churchill*, 35 Minn. 318; *Barber v. Evans*, 27 Id. 92, 93.

The tax judgment through which the defendant's asserted title was derived was based upon a publication of the delinquent list in a newspaper in said county, which at the time of the publication, appeared under the name or title, "Glencoe Enterprise." This newspaper had previously been called the "McLeod County Enterprise," but the name had been changed as above indicated. In common speech it was spoken of as the "Enterprise." It was the only paper published in the county bearing that name. Only one other newspaper was published in the county. That was published under the name, "Glencoe Register." It is claimed that the county commissioners had not sufficiently designated this newspaper for the publication of the delinquent list, because in their resolution they merely named the "Enterprise." We think that this designation was sufficient, in view of the facts that the publication was required to be made in a newspaper published in that county (if any paper was published there, such as the statute specifies), and that there was no other paper in the county bearing that name.

In the delinquent list, as published, the terms of description in question were: "Felix Cornoyer N $\frac{1}{4}$ N E $\frac{1}{4}$ S E $\frac{1}{4}$ N E $\frac{1}{4}$ N E $\frac{1}{4}$ of N W $\frac{1}{4}$ 23, 114, 30, 160." The figures "23," "114," "30," and "160" were in columns headed so as to indicate that these terms designated, respectively, section, township, range, and the number of acres. Felix Cornoyer was the owner of the land in question. The above terms certainly do not correctly describe the land which is the subject of this action. If

read without alteration by the insertion of conjunctions or marks of punctuation, to indicate that several parcels are intended to be included, these abbreviations designate a tract in the northeast quarter of the northeast quarter of the northwest quarter of the section, which, if the section be of the ordinary area, would be about thirty-one hundredths of an acre in extent. They can only be made descriptive of the land in question by inserting or implying words or marks to effect a separation of the terms, which upon their face constitute but a single description. It is contended that the statement of the number of acres shows that these terms should be separated into different descriptions, so as to designate several tracts having an aggregate area of 160 acres, and that only one such division is possible. We are of the opinion that, under the strict rule which is always applied in such cases, this consideration does not justify holding this description, which is in fact erroneous, to be a sufficient designation of the land in question for the purposes contemplated in the publication of the delinquent list. The principal object for which that publication is required is to give notice to those persons interested in the land, and whose attention may be in no other way drawn to the facts involved in the notice. Hence, while a particular description which the parties to a deed of conveyance may have adopted to designate the land intended by them to be conveyed may be sufficient, although in some respect erroneous, it does not follow that such a description in a published tax list would be legally sufficient as constructive notice. In such a publication a description which is in fact erroneous, and which is calculated to mislead, is insufficient: *Tallman v. White*, 2 N. Y. 66; *Cooley on Taxation*, 404 et seq. It seems to us that this description was such as might mislead one whose attention is not called to the fact of the erroneous designation. If, for instance, a person interested in the southwest quarter of the northeast quarter of this section had looked through this published list to learn whether that tract was there charged with delinquent taxes, he would, as may be supposed, have found no such land described in the list. If actually informed that the description in question was not what it was intended to be, and that it was intended to embrace that tract, he might then, with a little study, discover that this description could only be made to designate 160 acres of land, in a section of 640 acres, by such alteration of the terms as would make the "S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ "

a distinct description. In view of the purpose for which such a publication is required, it would seem that an erroneous description here would, in general, be at least as objectionable as in a tax deed. In *Orton v. Noonan*, 23 Wis. 102, a description in a tax deed was: "Part of N. W. $\frac{1}{4}$ lot 3, [. . .] 5 25-100 acres of sec. 9, T. 7, R. 22." The court read this as meaning upon its face, "Part of northeast quarter of lot 3," etc., and held that the words "being" or "described as" should not be supplied by intendment, instead of "of" (which would have made the description applicable to the land in question), as that would change the sense as it would be ordinarily understood. In *Keith v. Hayden*, 26 Minn. 212, a judgment describing the land as "S. $\frac{1}{2}$ N. E. $\frac{1}{4}$ & N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 32," etc., designated also as being 120 acres, was held insufficient, although it might have been said, as it is here, that 120 acres of land could be described by these terms only by reading them as the south half of the northeast quarter and the northwest quarter of the southeast quarter of the section.

The delinquent list, as published, being thus fatally defective, there was no jurisdiction, and the judgment was void, and is not protected from attack by the lapse of the statutory period of limitation: *Feller v. Clark*, 36 Minn. 338; *Sanborn v. Cooper*, 31 Id. 307.

Judgment affirmed.

ACTION TO QUIET TITLE, when and when not maintainable: See *Smith v. McConnell*, 17 Ill. 135; 63 Am. Dec. 340; *Blanchard v. Tyler*, 12 Mich. 339; 86 Am. Dec. 57; *Wetherell v. Eberle*, 123 Ill. 666; 5 Am. St. Rep. 574, and note 577; *Northrop v. Andrews*, 39 Kan. 567. Possession of one of several joint owners of land is the possession of all, and where one is thus in possession by his co-tenant, he may maintain an action to quiet his title: *Scott v. Scott*, 85 Ky. 385.

TAX SALE IS VOID IF STATUTE IS NOT FOLLOWED in any matter material to sale, as if the land is not advertised, or if it is misdescribed in the advertisement, etc.: *Wallace v. Brown*, 22 Ark. 118; 76 Am. Dec. 421; *Bidwell v. Webb*, 10 Minn. 59; 88 Am. Dec. 56. Sufficient compliance with statute as to advertisement of tax sale in newspaper: See *Cass v. Bellows*, 31 N. H. 501; 64 Am. Dec. 347.

LAKE SUPERIOR LAND COMPANY v. EMERSON.

[38 MINNESOTA, 406.]

WATERS—RIPARIAN RIGHTS.—TITLE TO SOIL UNDER WATER AND BEYOND LOW-WATER MARK of a navigable stream or lake is in the state, and a deed of conveyance executed by the owner of the abutting shore, purporting to convey such soil, is wholly inoperative.

ONLY RIGHTS WHICH RIPARIAN OWNER CAN HAVE BEYOND LOW-WATER MARK are certain riparian rights incident to land bordering upon navigable water. Such rights exist *jure naturee*, and cannot be severed and transferred apart from the abutting shore, so as to become rights in gross.

RIPARIAN RIGHTS INCIDENT OR APPURTENANT to no land cannot exist.

CLOUD UPON TITLE.—GRANTEE IN DEED OF LAND ABUTTING ON NAVIGABLE STREAM MAY MAINTAIN ACTION to remove the cloud upon his riparian rights, created by a prior deed to another grantee from the same grantor, purporting to convey the soil under the water and beyond low-water mark.

ACTION to remove cloud upon title. The opinion states the case.

Phelps and Smith, for the appellants.

White, Shannon, and Reynolds, for the respondent.

GILFILLAN, C. J. In 1858, the owner of what is known as Rice's Point, a point of land extending into that part of Lake Superior now called the bay of Duluth, platted the same as a town, and recorded the plat. On the plat there were delineated certain blocks, numbered 64, 75, 84, and 95. The streets separating these blocks have since been duly vacated, so that they now lie in one solid parcel of land, which is bounded on the east by the waters of the bay. At the time of the platting, said parcel as platted extended to and beyond the low-water mark, and the bay front of the parcel was then, ever since has been, and now is under water. There were also delineated, on said plat, blocks in front of said parcel, which were, as shown on the plat, in the water beyond the low-water mark, and where the person then platting had no title to the land. Among the blocks so delineated in the water, and below the low-water mark, was one numbered 122. The said owner thereupon conveyed blocks 64, 75, 84, and 95, and plaintiff now has the title so conveyed. On the same day, said owner executed to one Wilson a deed purporting to convey to him block 122, and Wilson subsequently executed to defendants a deed purporting to convey said block to him. Plaintiff is in the actual possession of the blocks so conveyed to it.

The chief question in the case is, What did the plaintiff's and the defendants' grantors respectively get by the deeds from the said owner? That owner owned the land only to low-water mark. The title to the soil beyond that, and under the water, was in the state. The only rights he could have beyond the low-water mark were certain riparian rights incident to land bordering upon a navigable stream or lake. Among these were the right to enjoy free communication between his abutting premises and the navigable waters of the lake, to build and maintain suitable landings, piers, and wharves on and in front of his land, and to extend the same therefrom into the lake to the point of navigability, even beyond low-water mark; and to this extent exclusively to occupy for such and like purposes the bed of the lake, subordinate to the public paramount right of navigation: *Brisbine v. St. Paul and Sioux City R. R. Co.*, 23 Minn. 114; *Union Depot etc. Co. v. Brunswick*, 31 Id. 297; 47 Am. Rep. 789. These rights all pertain to the use of abutting land in connection with the water, or of the water in connection with the land. The right to use beyond the low-water mark rests upon the title to the bank, and not to the bed of the water: *Diedrich v. Northwestern Union R'y Co.*, 42 Wis. 248; 24 Am. Rep. 399. It is a right peculiar to the owner of the land bordering on the lake or stream, and not possessed by others: *Morrill v. St. Anthony Falls Water-Power Co.*, 26 Minn. 222; 37 Am. Rep. 399, and cases cited. The owner of the abutting land has the right to enjoy, for the purposes of gain or pleasure, all the facilities which the location of his land with reference to the lake affords: *Delaplaine v. Chicago & N. W. R'y Co.*, 42 Wis. 214; 24 Am. Rep. 386. It exists *jure naturæ*, because the land has, by nature, the advantage of being washed by the stream: *Lyon v. Fishmongers' Co.*, L. R. 1 App. Cas. 662. The right is incident to the land,—belongs to it by nature. We have not found any case holding that it may be severed from the right to the abutting land, so as to become a right in gross; one person owning exclusively the shore, and another the riparian right incident to it, though owning no shore. As the owner of the shore has no title to the soil under the water, he can convey nothing in the soil; and, as he cannot convey the riparian right severed from the shore, his deed of conveyance of the soil under the water must be inoperative. Undoubtedly, he may release his riparian right to the owner of the soil under the water,—the state, or its grantee or licensee. Per-

haps he may transfer the right to the owner of shore-land, in connection with which it can be used and enjoyed, though not directly abutting; but that is not this case. Riparian rights incident or appurtenant to no land cannot exist. No interest passed by the deed under which defendants claim. The grantee in that deed, and his grantees, must be presumed to have known the situation and character of what the deed purports to convey, so that no estoppel could arise by reason of it.

An action to remove the cloud on plaintiff's title created by the deed can be maintained. The deed is valid on its face. The manner in which block 122 is delineated on the plat is probably notice to parties assuming to purchase that block that it lay below the low-water mark (if such were the fact). But it was not conclusive of that fact. Notwithstanding what appeared by the plat to be the situation of the block with respect to the water, it might still be shown (if such were the fact) that the block did not lie under water.

The act making Rice's Point, as platted, a part of the city of Duluth cannot be construed as a transfer or surrender by the state of its title to the soil below low-water mark.

Judgment affirmed.

WATERCOURSES, TITLE AND RIGHTS OF RIPARIAN OWNER: *Welles v. Bailey*, 55 Conn. 292; 3 Am. St. Rep. 48, and cases collected in note 53; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372.

TERM "TIDE-LANDS" APPLIES to those lands adjoining mainland, and periodically covered and uncovered by the rising and falling tides: *Elliott v. Stewart*, 15 Or. 259.

RIGHT OF RIPARIAN PROPRIETORS, AT COMMON LAW, to use of waters of stream: *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788, and cases collected in note 797.

CLOUD UPON TITLE: See *Bausman v. Kelley*, *ante*, p. 661, and note 668.

PEEL v. MCCARTHY.

[38 MINNESOTA, 451.]

GUARDIAN AND WARD. — WHERE GUARDIAN OF INFANT DIES WITHOUT HAVING RENDERED ANY ACCOUNT of his guardianship, the probate court which appointed him may require the personal representative of the deceased to account for the moneys of the ward received by the guardian in his lifetime.

John D. O'Brien, for the appellant.

John W. Willis, for the respondent.

DICKINSON, J. In or prior to 1868, Jeremiah McCarthy was, by the probate court of Dakota County, appointed guardian of an infant, Mary Connors. In that year, as such guardian, and under license from that court, he sold certain real estate of the infant, and received the price of it, \$902.89. This sale was never reported to nor confirmed by the court; but the former ward (now Mary C. Peel) affirmed the sale, and sought to recover the price so paid to her former guardian, which he had never paid over or accounted for to the probate court. In August, 1885, Mary C. Peel filed her petition to the probate court for an accounting by the guardian in respect to this matter. In September, 1885, McCarthy died, being then a resident of Ramsey County; and by the probate court of that county this appellant was appointed administratrix of his estate. Thereafter the administratrix was, by order of the probate court of Dakota County, after notice, substituted in place of the deceased guardian in such proceedings for an accounting. After this the probate court of Dakota County issued its order or citation to the administratrix, commanding her, as such administratrix, to appear before that court to show cause why she should not make report to that court of the sale before referred to, and why she should not account and pay over to the petitioner the proceeds of the sale, and why the prayer of the petition should not be granted. After service of this citation, the administratrix did not appear or show cause as commanded, and, after hearing proofs on the part of the petitioner, the court found the allegations of the petition to be true; that the estate of the deceased was indebted to the petitioner in the sum of \$902.89, with interest from the time of such sale; and it was adjudged that the administratrix pay the same. Thereafter, in proceedings in the probate court of Ramsey County in the same year (1886), after a hearing upon the question of allowing this claim of Mary C. Peel as a debt against the estate, the claim was allowed by the probate court, and a judgment was rendered for the recovery of the same, and directing payment thereof to be made by the administratrix in the course of the administration of the estate. The administratrix appealed to the district court, where the judgment of the probate court was affirmed, from which latter judgment she then appealed to this court. The only ground upon which the appellant relies is, that the probate court of Dakota County had not jurisdiction to enter judgment against the administratrix in the

guardianship proceedings, and hence that its determination of the liability of the administratrix was a nullity, and constituted no foundation for the adjudication of the probate court of Ramsey County.

We are of the opinion that the probate court of Dakota County had authority to call upon the administratrix of the deceased guardian's estate to account for the moneys of the ward received by the guardian in his lifetime, and to declare her liability in respect to the same: *Kittredge v. Betton*, 14 N. H. 401; *Gregg v. Gregg*, 15 Id. 190; *Woodbury v. Hammond*, 54 Me. 332; *Waterman v. Wright*, 36 Vt. 164. We do not discover in our statute any express provision upon the point in question. It is, however, manifestly contemplated that the accounts of guardians shall be rendered to the probate court by which they have been appointed, and whose authority to direct and control their conduct and to settle their accounts is explicitly declared by statute: Gen. Stats. 1878, c. 49, sec. 3. The prescribed conditions of a guardian's bond are, among other things, that he will render account within a stated time, and at such other times as the probate court shall direct; and that he will, at the expiration of his trust, settle his accounts with the judge of probate, or with the ward, and pay over, etc.: Gen. Stats. 1878, c. 59, sec. 27. It is most consistent with the manifest purpose of the statute that, if a guardian dies without having rendered any account, his personal representatives may be required to account for property of the ward alleged to have been received by the guardian. If this cannot be done, the probate court, having full and exclusive jurisdiction concerning the guardianship, is powerless to require any accounting or settlement. Nor is there any apparent reason why the administratrix may not be thus required to account, except that which may be urged in respect to any alleged liability of the intestate,—that is, the want of personal knowledge on her part concerning the matters in question. She has, however, presumably, in her possession all the means of information which are in existence,—in the accounts, vouchers, and other instruments or evidence relating to the guardianship which were in the possession of the guardian at the time of his death. She, if any one, can account for what has been received; and as the estate which is in her hands for administration is responsible for whatever property may have been received by the guardian, and not expended,

it is most proper that she should account therefor to the court having jurisdiction concerning the guardianship.

Judgment affirmed.

METHODS OF COMPELLING ACCOUNTS WITH DECEASED ADMINISTRATORS AND GUARDIANS. — It was formerly held in New York that a surrogate had no power or authority to compel the representatives of a deceased guardian to account and pay over a balance found due from him: *Farnsworth v. Oliphant*, 19 Barb. 30; *Andrade v. Cohen*, 32 Hun, 225. And that the surrogate had no jurisdiction to cite A as executor or administrator of B, to account for B's dealings as executor or administrator of C with C's estate, except for such assets of C as had come into A's possession: *Dakin v. Denning*, 6 Paige, 95; *Montross v. Wheeler*, 4 Lans. 99. But relief was to be obtained by complaint in a court of equity: *Farnsworth v. Oliphant*, 19 Barb. 30, 35. And by the amendment of section 2606 of the Code of Civil Procedure, a surrogate's court may now require an accounting from the representative of a deceased executor or administrator, in like manner as it might have from the latter during his lifetime, after revocation of his letters: *Herbert v. Stevenson*, 3 Demarest, 236; and see *Bieder v. Steinhauer*, 15 Abb. N. C. 428. In California, the probate court has no authority to cite the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator: *Bush v. Lindsey*, 44 Cal. 121; and see *Wetzler v. Fitch*, 52 Id. 638. And where an administrator dies without rendering an account, jurisdiction to compel an accounting vests in the appropriate court of equity: *Chauquette v. Ortet*, 60 Id. 594. And in several of the states, the jurisdiction of the court of probate and of the court of chancery is concurrent in matters of administration and of guardianship: See *Hailey v. Boyd*, 64 Ala. 399; *Wager v. Wager*, 89 N. Y. 161; *State v. Dilley*, 64 Md. 314; but the jurisdiction of the latter court in the administration of an estate ceases when the special matter for which it was invoked has been disposed of. As a general rule, when that is done the matter should be sent back to the probate court, with instructions if necessary: *Hawkins v. Layne*, 48 Ark. 544, 548; compare *Freeland v. Dazy*, 25 Ill. 294; *McDonald v. Aten*, 1 Ohio St. 293. In Alabama, when an administrator has died without settling his accounts, and his personal representative becomes the administrator *de bonis non* of the intestate's estate, which is declared insolvent, it is held that the dual and antagonistic relations which he sustains take away the jurisdiction of the probate court to make a settlement with him of the accounts of the deceased administrator; and a settlement made by him in that court, being void on its face for want of jurisdiction, may be set aside at a subsequent term: *Buchanan v. Thomason*, 70 Ala. 401; and see *Alexander v. Alexander*, 70 Id. 212.

DE GRAFF v. QUEEN INSURANCE COMPANY.

[38 MINNESOTA, 501.]

INSURANCE. — LANGUAGE OF CONDITION IN POLICY OF INSURANCE MUST BE CLEAR and unambiguous, and any reasonable doubt as to its meaning must be resolved in favor of the insured. The terms employed must be construed with reference to the nature of the property insured, the purposes for which it is ordinarily used, and the manner in which it is usually kept, so as to give the conditions, if possible, a meaning reasonably applicable to the kind of insurance upon that particular species of property.

CONSTRUCTION OF INSURANCE POLICY WITH REFERENCE TO SITUATION OF PROPERTY INSURED. — A statement in a policy of insurance against fire and lightning, describing live-stock covered by the policy as being in a certain barn, taken in connection with a clause in the policy providing that the company "shall not be liable for more than the sum or sums insured, nor the interest of the insured, except as hereinafter provided, as specified upon the property described in the places herein set forth, and not elsewhere," is to be construed as mere matter of description for identification of the property insured, and not a promissory stipulation on the part of the insured, or a condition of insurance on the part of the insurer, that such location of the property should remain unchanged.

Spooner and Spooner, for the appellant.

W. D. Cornish, for the respondent.

MITCHELL, J. This was an action on a policy of insurance, to recover the value of a brood mare, which was killed by lightning April 20, 1886. The policy was issued in November, 1882, to plaintiff's testate, the owner of the farm described, and insured him, for the period of five years, against loss or damage by fire to the property described, to the amount of \$7,500, distributed as follows: \$1,000 on his one and one half story wood dwelling; \$250 on his household furniture therein; \$3,000 on his wood barn; \$2,500 on live-stock therein; \$750 on his wood hog-house, — all situated on the northeast quarter of section 4, township 107, range 24, township of Aulton, Waseca County, Minnesota. It was stipulated in the policy that it should cover loss or damage by lightning, whether fire ensued or not. The policy also provides "that the said company shall not be liable for more than the sum or sums insured, nor the interest of the insured, except as hereinafter provided, as specified upon the property described in the places herein set forth, and not elsewhere." At the time this policy was issued, the live-stock on the farm (including this mare), when housed, were usually kept in the barn described in the policy, but were turned out to pasture during the sum-

mer. After the policy was issued, and shortly before the loss, the insured built upon the farm a new barn, two hundred or three hundred feet distant from the old one. Four or five weeks before the loss, he put the mare in the new barn, where she remained until killed by lightning. The insured testified that this removal was temporary; but he stated no definite time when he intended to return the mare to the old barn, and the evidence shows that the only reason for the change was one of convenience in caring for the animal. No claim is made that the risks insured against were greater in one barn than in another. The contentions of the appellant are: 1. That, under the policy, the mare remained insured only when in the wood barn described, and not elsewhere; and 2. Even if the policy is not construed thus strictly, she would remain insured only while removed temporarily for some purpose incident to the ordinary use and enjoyment of the property; and that the removal to the new barn for a period of several weeks, for no particular reason except the matter of convenience, was not a temporary but a permanent removal. Under the view we take of the case, both of these contentions can be disposed of together. The appellant rests his construction of the policy mainly upon the two clauses which we have italicized.

In the construction of such policies, there are two elementary rules: first, the language of a condition in a policy, being that of the insurer, selected by him, and intended for his benefit, must be clear and unambiguous, and any reasonable doubt as to its meaning must be resolved in favor of the insured. The tendency of such stipulations is to narrow the range of the underwriter's principal obligation; and again, if the meaning is ambiguous, it is his own fault in not making use of more definite terms in which to express it: *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385; *Loy v. Home Ins. Co.*, 24 Minn. 315; 31 Am. Rep. 346; *Cargill v. Millers' etc. Ins. Co.*, 33 Minn. 90; *Boright v. Springfield F. & M. Ins. Co.*, 34 Id. 352; *Olson v. St. Paul F. & M. Ins. Co.*, 35 Id. 432; 59 Am. Rep. 333. A second rule is, that the language of a policy must be construed with reference to the nature of the property to which it is applied. Such policies must be presumed to have been made with reference to the purposes for which such property is ordinarily used, as well as the manner in which it is usually kept: *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 229; *Boright v. Spring-*

field F. & M. Ins. Co., supra. It may be added, as within this rule, that the terms and conditions of a policy should be construed, if possible, so as to give them a meaning reasonably applicable to the kind of insurance upon the particular species of property insured.

Turning now to the two clauses in the policy relied on by appellant, and taking up the last one first, we remark that, after much consideration and discussion, we have been unable to arrive at any certain or satisfactory conclusion as to what it does mean, except that the clause quoted, taken as a whole, was intended to make assurance doubly sure that the policy was a "specific" and not a "blanket" one. Appellant construes the expression, "as specified upon the property described, in the places herein set forth, and not elsewhere," as meaning that the property remained insured only while in the wood barn, and not elsewhere. But, in framing this proposition, counsel himself finds it necessary to use the words "only" and "while"; neither of which, nor their equivalents, are to be found in the clause itself. If it was intended to insert any such condition in the policy, it ought to have been so expressed that "he who runs may read." The clause is, at least, equally susceptible of the construction that the expression, "as specified, upon the property described, in the places herein set forth," refers back to the description of the property given in the previous portion of the policy, so as to limit the insurance and the several amounts, respectively, to the property already described as in those places; and that the expression "and not elsewhere" is added merely to express in negative form what is already expressed affirmatively. If it will reasonably admit of such a construction, it must be adopted in favor of the insured. So construed, it neither adds to nor takes from the force of the description first given, viz., "live-stock therein," and the policy may be construed as if this was the only statement as to the location of the property.

In this case a single form of policy is used to cover two kinds of risk, viz., fire and lightning; and to cover three classes of property, viz., buildings, which are fixed and immovable; household furniture, which, although movable, is ordinarily kept and used permanently in one place; and lastly, live-stock, which, from its very nature, must necessarily change its location from time to time. The form of policy here used is an ordinary fire policy, adapted more

especially to insurance of inanimate property against fire, but made to cover live-stock, and having a "lightning" clause inserted. Hence words descriptive of location might, as to one class of property, or as to one kind of insurance, be treated as a statement of a fact relating to the risk, and as amounting to a stipulation or condition that the property should remain there; while as to another class of property, or as to the other kind of insurance, it might be construed as mere description for the purposes of identification.

This action is to recover for the loss of live-stock by lightning, and the language of the policy must therefore be construed as applied to insurance upon that particular species of property. The parties must be presumed to have known that danger from lightning exists almost wholly in the summer, when live-stock is out in the fields. No man of common sense would take a policy of insurance against lightning which only covered his stock when in a particular barn. Such stock cannot well be, and is not usually, kept permanently in a building. The ordinary uses to which it is put forbid it; and the usual and proper treatment of it requires that it be turned out to pasture about one half the year at least. According to the usual course of farming operations, it is not customary to treat an animal, even when housed, as attached to some particular building, as a part of its contents, but to change its place of stabling from time to time, as necessity or convenience may require. The parties must be presumed to have had all these facts in view when they made this contract. If appellant's contention be correct, this policy would not cover a loss occurring while the stock is out at pasture during the summer, for that could hardly be called a temporary removal from the barn for some temporary purpose incident to the ordinary use and enjoyment of the property. Again, the property was insured for five years. Suppose the barn described in the policy had been destroyed the next day after the policy was issued; according to appellant, the insurance on the stock would have terminated forever. Any such construction would defeat the main purpose of the contract.

In view of these considerations, our conclusion is, that the statement in the policy that the stock was in this barn is not a promissory stipulation on the part of the insured, or a condition of insurance on the part of the insurer, that such location should remain unchanged, but as to that class of property, and as to that kind of insurance, at least, is mere matter of

description for identification of the property insured, indicating that it was the stock which was usually kept in that barn at that time: *Everett v. Continental Ins. Co.*, 21 Minn. 76; *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Id. 229. In this view of the case, it becomes wholly immaterial for what purpose or for what length of time the mare was removed from the old barn to the new. In changing her location from one barn to another, on the same farm, as convenience required, the insured was treating her precisely as any farmer would and might do in the ordinary way of managing stock.

Order affirmed.

CONTRACT OF INSURANCE IS TO BE CONSTRUED WITH REFERENCE TO SUBJECT-MATTER, and with a view to the object and intention of the parties, as the same may be gathered from the instrument: *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362; *Straus v. Imperial Fire Ins. Co.*, 94 Mo. 182; 4 Am. St. Rep. 368; *Frost's D. L. etc. Co. v. Insurance Co.*, 37 Minn. 300; 5 Am. St. Rep. 846; *Home Ins. Co. v. Gwathmey*, 82 Va. 923. Language of policy to be construed most strongly against insurer: *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144.

CONSTRUCTION OF POLICY WITH REFERENCE TO SITUATION OF PROPERTY INSURED: *Longueville v. Western Assurance Co.*, 51 Iowa, 553; 33 Am. Rep. 146; *Lyons v. Providence etc. Ins. Co.*, 13 R. I. 347; 43 Am. Rep. 32, and note 34; *Ludwig v. Insurance Co.*, 48 N. Y. 379; 8 Am. Rep. 556; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240; 14 Am. Rep. 249. Where a policy described a carriage insured as "contained in a frame barn," and the carriage was destroyed by fire while at a carriage-shop undergoing repairs, it was held that the loss was covered by the policy: *McCluer v. Girard Ins. Co.*, 43 Iowa, 349; 22 Am. Rep. 249, and note 253.

HERSEY v. WALSH.

[38 MINNESOTA, 521.]

MEASURE OF DAMAGES IN ACTION FOR CONVERSION OF PROMISSORY NOTE, in the absence of other evidence, is the face of the note, with interest.

JUDGMENT RENDERED BY COURT OF GENERAL JURISDICTION WILL BE PRESUMED to have been authoritatively entered by the clerk, in the absence of proof *aliunde*.

WHERE JUDGMENT BY DEFAULT, IN ACTION FOR CONVERSION OF PROMISSORY NOTE, IS ENTERED by the clerk for the proper amount of damages, such judgment will not be treated as absolutely void because it was entered without any order or direction of the court, nor will it be set aside for such irregularity merely, especially after considerable delay.

Fayette Marsh, for the appellant.

O. H. Comfort, for the respondents.

VANDEBURGH, J. Judgment was entered in this action upon default after personal service of the summons. Execution was issued, and returned unsatisfied, and pending proceedings supplementary to the execution, the defendant made a motion, based solely upon the record, to set aside the judgment, and for his discharge, on the ground that it was void. From the order of the district court denying this motion, this appeal is taken. The only question considered by the court below was whether the judgment was presumptively void and without jurisdiction upon the face of the record, so as to entitle the defendant to be relieved from the orders made in the supplementary proceedings.

As appears by the complaint, the action was brought for an alleged conversion of a promissory note belonging to the plaintiffs, given for the sum of four hundred dollars and interest. The defendant having failed to answer, judgment was entered for the amount of the note, principal and interest. The record shows the usual proof of the service of the summons, and of defendant's default, but is silent as to any further proceedings. The court had jurisdiction of the defendant and the subject-matter; and as the measure of damages in such an action is the face of the note, in the absence of any showing to the contrary, the amount for which judgment was entered is presumptively correct: *Booth v. Powers*, 56 N. Y. 22; *Barron v. Mullin*, 21 Minn. 374. The judgment is not void for anything appearing affirmatively upon the record; and having been rendered by a court of general jurisdiction, it will be presumed to have been authoritatively entered by the clerk, in the absence of proof *aliunde*: *Galpin v. Page*, 18 Wall. 350, 366; *Kipp v. Collins*, 33 Minn. 394; *Frankfurth v. Anderson*, 61 Wis. 107. Had the defendant shown, by evidence outside the record, that there was irregularity in the proceedings, and that the judgment was entered without any order or direction of the court in the premises, still, under the decisions of this court, the judgment would not be absolutely void or a nullity; and if the amount of damages as assessed was undisputed, and the judgment in fact entered for the proper sum under the pleadings, so that no prejudice could have resulted, the court would be justified in refusing to set it aside for the irregularity, especially after considerable delay, as in this case: *Dillon v. Porter*, 36 Minn. 341, and cases; *Libby v. Mikelborg*, 28 Id. 38; *Heinrich v. Englund*, 34 Id. 395.

Order affirmed.

WHERE RECORD FAILS TO SHOW THAT JUDGMENT BY DEFAULT WAS NOT PROPERLY ENTERED, the regularity of the proceedings will be presumed, and it will also be presumed that any notice required was given: *Evans v. Young*, 10 Col. 316; 3 Am. St. Rep. 583; see *Blount v. Gallaher*, 22 Fla. 92; *Harper v. Biles*, 115 Pa. St. 594; *Dillon v. Porter*, 36 Minn. 341; *Burrows v. Mickler*, 22 Fla. 577. All presumptions are in favor of the regularity of the proceedings of a court of competent jurisdiction, and its judgments will not be reversed unless error affirmatively appears of record: *McBride v. Lathrop*, 24 Neb. 93; *Ferguson v. Teel*, 82 Va. 690.

MEASURE OF DAMAGES IN TROVER, GENERAL RULE: *Moody v. Whitney*, 38 Me. 174; 61 Am. Dec. 239; *Backenstoss v. Stahler*, 33 Pa. St. 251; 75 Am. Dec. 592; *Ripley v. Davis*, 15 Mich. 75; 90 Am. Dec. 262; for converting negotiable instrument: *Porter v. Purdy*, 29 N. Y. 106; 86 Am. Dec. 283, note.

LEVY v. MILLER.

[38 MINNESOTA, 526.]

IF, IN GARNISHMENT PROCEEDINGS, AN INDEBTEDNESS IS DISCLOSED by the garnishee, but he also discloses the fact of a claim thereto by a third person as assignee, it is error for the court to order judgment against the garnishee until the claimant is duly cited and made a party; and unless this be done, the rights of such claimant cannot be barred or affected by the judgment.

JURISDICTION. — ORDER MADE BY COURT DIRECTING THAT ALLEGED CLAIMANTS of a debt garnished “be made parties, and that notice be served on them,” but not prescribing how the notice should be served, is to be construed as meaning personal service within the state, and no other service is sufficient to confer jurisdiction over the absent and non-resident claimants.

W. E. Akers, for the appellants.

Davenport and Thian, and *J. L. Dobbin*, for the respondents.

VANDEBURGH, J. The defendants were indebted to Saverius & Co. in the sum of \$250 for goods sold, and were garnished, in the district court of Hennepin County, in an action wherein one Jepson was plaintiff, and Saverius & Co. defendants, for an alleged indebtedness to the last-named firm. Prior to the service of the garnishee summons upon these defendants, the account against them for the goods mentioned had been sold and assigned to the plaintiffs, who duly notified the defendants of such transfer. Thereafter, on the thirtieth day of April, 1886, the garnishees, these defendants, made disclosure of the indebtedness, and of the fact of plaintiffs' claim thereto; and the record shows that the court thereupon made an order directing that the plaintiffs should be joined as parties to the garnishee proceedings, and “that notice thereof be served on

D. Levy and Son [plaintiffs], which notice and order [as the court finds] were personally served on said David Levy on the thirteenth day of May, 1886, at the city, county, and state of New York, and at no other time or place, and in no other manner." Plaintiffs, D. Levy and Son, of which firm David Levy was a member, then resided in the city of New York, and did not appear in such proceedings; but judgment was subsequently rendered therein, charging the garnishees, and barring all claims of the plaintiffs to the account and indebtedness in question.

The only matter necessary to be considered is, whether the court acquired jurisdiction to make such determination; and this involves the further question whether the service of the order and notice upon the plaintiffs in the city of New York was legally authorized, so as to give the court jurisdiction over them in the proceedings. Assuming that the debt was duly attached, the right of the plaintiffs could not be barred until after they were lawfully cited to appear and maintain their right: Gen. Stats. 1878, c. 66, sec. 174; *Look v. Brackett*, 74 Me. 347. If the matter of their claim was properly disclosed by the garnishees, it would also be error for the court to order judgment against the latter, against their objection, until the supposed assignees were duly cited; and after a reasonable time, the proceedings should have been dismissed if the plaintiff therein failed to make the proper service of the notice: *Jordan v. Harmon*, 73 Id. 259. The court, as it appears, ordered that the plaintiffs herein "be made parties, and that notice be served on them," but did not direct or prescribe how it should be served. By the order as made, service within the state was meant, and no other was authorized. Substituted service by publication, or outside the jurisdiction, to have been warranted, must have been so directed. It is unnecessary to consider whether personal service outside the state, if so directed, was authorized without publication in the state. The plaintiffs not having been duly cited to appear, the judgment must be reversed, and a new trial ordered.

GARNISHMENT, defenses available to garnishee: Note to *Lathrop v. Clay*, 100 Am. Dec. 511.

GARNISHEE, NOTIFIED OF IRREGULARITY OF GARNISHMENT AND OF ASSIGNMENT TO THIRD PARTY of his indebtedness to the principal defendant, must protect himself by presenting these facts in the garnishment proceedings; otherwise, he will be estopped from setting up the garnishment judgment in defense of an action by the assignee against him: *Black v. Brisbin*, 3 Minn. 360; 74 Am. Dec. 762.

QUINBY v. MINNESOTA TRIBUNE COMPANY.

[38 MINNESOTA, 528.]

LIBEL. — PRINCIPLE WHICH ALLOWS PROOF OF PROVOCATION IN MITIGATION OF DAMAGES IS INAPPLICABLE, where it is sought to prove, in mitigation of damages in an action for libel, that the alleged libelous publication was induced by the hasty promptings of passion, caused by a previous provoking publication at the instance of the plaintiff, in itself irrelevant to the issue in the action, if there had been time and opportunity for hot blood to cool. And the answer in such case, alleging that the publication which induced the libel in question was made the day before the latter publication, but not stating when it came to the knowledge of the defendant, may be properly stricken out.

Miller and Young, for the appellant.

Davis and Hidden, for the respondent.

DICKINSON, J. The complaint included as a cause of action an allegation of the publishing by the defendant in its newspaper, on the eighteenth day of April, of an alleged libelous article imputing to the plaintiff, who is a physician and surgeon, malpractice in the setting of a broken arm. The whole article was as follows, the latter part of it constituting the libel complained of: "The Sunday Globe was very much wrought up over a brutal jest, which had thrown an alleged prominent physician into a fit of hysterics. If the alleged prominent physician was so very much shocked, and so fully realized the enormity of the offense, why did he go so far out of his way to spread 'the cold-blooded brutality'? It may not be out of place to suggest to the alleged prominent physician that he mind his own business. Then, perhaps, people would not be shocked by such cold-blooded brutality as setting a man's broken arm in such a manner as to necessitate breaking it over again in order to do it right." The defendant alleged in its answer that this publication was made in a moment of heat and passion, induced by the previous publication, at the instance of the plaintiff, in another newspaper,—the Globe,—on the seventeenth day of April, of an article commenting on a paragraph which had been published in the defendant's newspaper on the sixteenth day of April, and which, in the Globe publication, was designated as "a brutal jest," and was further characterized by the terms "cold-blooded brutality and heartlessness." This part of the answer was stricken out upon motion, and the defendant appealed.

The question thus presented is, whether proof of these facts should be allowed in mitigation of damages. In itself the

matter published in the *Globe* was irrelevant to the issue in this case. It related to a subject entirely foreign to the subject involved in the alleged libel. It is probably true that the allusion in the first two sentences of the alleged libelous article is to this publication in the *Globe*, but that is of no consequence, for in no other way is it connected with the defamatory language which follows. By thus referring to the matter published in the *Globe*, the defendant could not establish a right to introduce that article in evidence, if the article was otherwise irrelevant to the issue. There was nothing in it which could make it admissible for the purpose of explaining the meaning of, or of giving character to, the wholly independent defamatory matter in issue, nor to affect the question of the culpability of the defendant, unless it be upon the ground that it was of a nature to provoke the publication in issue, and unless that was made under the hasty promptings of passion thus caused: *Gould v. Weed*, 12 Wend. 12. Only because the law makes some allowance for acts committed in the heat of sudden passion can such provocation, independent of the wrong complained of, and not constituting, with it, parts of the same transaction, be considered in mitigation of damages. The law does not allow independent wrongs of this character to be in effect set off against each other, and a balance to be found in favor of the less culpable party.

The principle above referred to, which allows proof of provocation in mitigation of damages, is the same as that which is applicable in the case of a provoked personal assault; and if there has been time and opportunity for hot blood to cool, and calm reason to resume its ordinary control, a mere provocation, not connected with the wrong complained of, cannot be shown: *Maynard v. Beardsley*, 7 Wend. 560, 564; 22 Am. Dec. 595; *Sheffill v. Van Deusen*, 15 Gray, 485; 77 Am. Dec. 377. If in this respect there is any distinction between cases of personal encounter and assault, and cases of libel, it would seem that the rule should be applied with at least as great strictness in the latter class as in the former, since the composition and publication of a written libel in general involves necessarily some degree of deliberation and opportunity for reflection. In the case last cited, — an action for slander, — a provocation given in the evening of the previous day was held not admissible. So in *Lee v. Woolsey*, 19 Johns. 319, 10 Am. Dec. 230, and in *Gronan v. Kukkuck*, 59 Iowa, 18, —

actions for an assault and battery, — provocations received the day before the acts complained of were held not admissible in mitigation of damages. See also *Keiser v. Smith*, 71 Ala. 481; 46 Am. Rep. 342, and authorities cited; and 1 Sutherland on Damages, 228, 231. There are plain reasons of public policy for this limitation of the right to rely, in extenuation of such wrongs, upon remote provoking inducements, not connected with the matter in issue. If the law were less strict, there would be less self-restraint from acts of violence and wrong, calculated to disturb the peace of society. Men would be too ready to take it upon themselves to avenge their personal grievances; and again, in the trial of causes for alleged wrongs, the principal issue would be embarrassed and confused, if not overwhelmed, by numerous collateral issues.

In the cause before us, the answer does not show a provocation within the rule above stated. It is alleged that the publication which induced the libel in question was made the day before the latter publication, but it is not stated when it came to the knowledge of the defendant. In the absence of any averment, it will not be presumed that this did not occur until the time when the defendant composed and published the article complained of. For this reason the action of the court below is sustained. It is at least doubtful whether, in any event, the article alleged to have provoked the libel was such as could be deemed sufficient to provoke one to turn aside from a consideration of the criticisms and comments upon the "brutal jest," to compose and publish of the author of it the wholly irrelevant imputation of malpractice.

Order affirmed.

IN ACTION FOR LIBEL, DEFENDANT MAY SHOW PROVOCATION BY LIBEL: *Hartford v. State*, 96 Ind. 461; 49 Am. Rep. 185. He may also show, in mitigation of damages, that, prior to publishing the alleged libel, he had seen the same matter in other newspapers: *Hewitt v. Pioneer Press Co.*, 25 Minn. 178; 23 Am. Rep. 680. But see *Sheahan v. Collins*, 20 Ill. 325; 71 Am. Dec. 271. Where the libel charged culpable neglect by a public officer of official duty, evidence, in mitigation of damages, that it was the general opinion and common talk of the community that the officer was guilty of such neglect of duty, unless it had come to the knowledge of and was believed in and relied on by the defendant in making the publication, is inadmissible: *Larrabee v. Minn. Tribune Co.*, 36 Minn. 141.

FACT THAT SLANDEROUS WORDS WERE SPOKEN IN HEAT OF PASSION, which was provoked by the one concerning whom they were spoken, may be shown in mitigation of damages: *Jauch v. Jauch*, 50 Ind. 135; 19 Am. Rep. 699; but not in bar of the action for slander: *Mousler v. Harding*, 33 Ind. 176; 5 Am. Rep. 195.

CABLE v. BYRNE.

[88 MINNESOTA, 534.]

NEW TRIAL.—ACTION OF TRIAL COURT IN SETTING ASIDE VERDICT not supported by a clear preponderance of evidence, and granting a new trial, should be sustained, unless the result is affected by some other consideration.

EXECUTIONS.—SHERIFF HAVING SOLD PERSONAL PROPERTY ON EXECUTION, IN TERMS, BUT WITHOUT AUTHORITY, "subject" to a certain mortgage, and the execution creditor having purchased the property in fact upon that condition, he will not be heard, while insisting upon and asserting a title acquired by that sale, to claim that the condition is not binding upon him.

PURCHASER AT PUBLIC SALE IS AFFECTED BY TERMS or conditions of sale announced at the opening, although he did not come upon the ground until after the opening. If he would know upon what terms or under what circumstances the sale was being made, he should make inquiry.

H. H. Herbst, for the appellant.

E. M. Card, for the respondent.

DICKINSON, J. This is a contest respecting the title to certain personal property; the plaintiff's claim being by virtue of a sale upon execution upon a judgment against one Merrick, the former owner of the property; and the defendant's, under an unrecorded chattel mortgage from Merrick, executed prior to the levy of the execution. A question of fact was involved as to whether or not the officer who made the execution sale sold the property in express terms subject to the mortgage. This was submitted to the jury, and their finding, in effect, that it was not so sold, was set aside by the trial judge, and a new trial ordered, because he deemed this finding not justified by the evidence.

An examination of the case satisfies us that the finding of the jury upon this point was not supported by a clear preponderance of the evidence. On the contrary, the case affords strong reason for the conclusion that the verdict was opposed to the weight of the evidence; therefore the order granting a new trial should be sustained, unless the result is affected by some other consideration: *Hicks v. Stone*, 13 Minn. 398 (434); *Crosby v. St. Paul City R'y Co.*, 34 Id. 413, and cases cited; *Taylor v. Spaulding*, 36 Id. 550. But the appellant says that there have been several previous trials with the same result; and urges that therefore the verdict should not be disturbed. The facts as to former trials and verdicts are not so presented in the case that we can consider them as affecting the question

under consideration; nor does it appear upon what evidence former verdicts may have been based, or upon what grounds new trials may have been allowed.

The appellant makes the point that, although the officer, in terms, sold the property subject to the mortgage, it was of no legal effect to qualify the title of the purchaser. The majority of the court are of the opinion that this position cannot be sustained. Although the officer had no authority to prescribe such a condition, and although the sale might have been set aside as irregular, yet the sale was so made. The plaintiff purchased, in fact, upon that condition, and cannot now be heard, while insisting upon and asserting a title acquired by that sale, to claim that this express condition is not binding upon him: *Stackpole v. Glassford*, 16 Serg. & R. 163; *Muse v. Letterman*, 13 Id. 167. The plaintiff, upon whose judgment the execution sale was made, was under no necessity to acquiesce in this condition. If the property had been sold to another purchaser upon such conditions, which were calculated to affect the purchase price, and in reality to give precedence to the unrecorded mortgage, he might have had the sale set aside for irregularity. But, on the other hand, if he chose to accept the unauthorized terms, and to purchase the property as it was offered for sale, for a price presumably less than would otherwise have been bid, because of this condition, he cannot, as against the mortgagee, be now heard to say that the condition was of no legal effect.

The appellant claims that this condition of sale did not effect him as a purchaser, because some little time intervened between the time of opening the sale, when the announcement was made, and the time when he came to the place of sale and purchased the property. This delay did not affect the case. The sale having been opened, one coming upon the ground after that was affected by any terms which had been previously announced. If he would know upon what terms, or under what circumstances, the sale was being made, he should make inquiry. It is the opinion of the majority of the court that the order granting a new trial should be affirmed.

Ordered accordingly.

TRIAL COURT HAS DISCRETION TO GRANT NEW TRIAL when it is of opinion that the verdict is contrary to the weight of evidence, and the appellate court will not interfere with its discretion in so doing, except in extreme cases, or where it is apparent that the lower court has proceeded upon an erroneous hypothesis: *Bennett v. Hobro*, 72 Cal. 178; *Murphy v. Hindman*, 37 Kan. 267;

Moore v. Rosser, 76 Ga. 329; *Hielt v. Cherokee R. R.*, 77 Id. 574; *People v. Hotz*, 73 Cal. 241; and see *Lawrence v. Burnham*, 4 Nev. 361; 97 Am. Dec. 540.

PURCHASER AT EXECUTION SALE CANNOT, IN EQUITY, BE EXCUSED FROM CONSUMMATING HIS PURCHASE, because, never having attended such a sale before, and not hearing the terms of the sale, he supposed himself to be buying the entire estate in question, and not the "right, title, and interest" of the judgment debtor in it: *Upham v. Hemill*, 11 R. I. 565; 23 Am. Rep. 525, and note 527.

JOHNSON v. OSWALD.

[38 MINNESOTA, 550.]

PLEADING — ACTION FOR CONVERSION. — GENERAL RULE IS, THAT ANYTHING WHICH TENDS TO CONTROVERT directly the allegations in the complaint may be shown under the general denial. And where the complaint in an action for the conversion of personal property simply alleges title in the plaintiff, without stating how he acquired it, the defendant may show, under a general denial, that the sale under which the plaintiff claims title was void, so as to pass no title, by reason of fraud, and his rescission of the sale and retaking of the property.

Thomas Canty, for the appellants.

Henry J. Gjertsen, for the respondent.

GILFILLAN, C. J. This action was for conversion of personal property. The complaint alleges, generally, without referring in any way to the means by which he acquired title, that the chattel was the personal property of the plaintiff, and that he was in possession of it, and that the defendants caused it to be wrongfully taken from him. The answer is a general denial. The defendants offered to prove, in substance, that they, owning the chattel, were induced to sell it to one Larson, from whom plaintiff claims to derive his title, by his (Larson's) false and fraudulent representations, and that, upon discovering the fraud, they rescinded the sale and retook the chattel. There was already in the case evidence sufficient to go to the jury that plaintiff was not a *bona fide* purchaser of Larson's title. The court below excluded the evidence so offered.

The question raised is, Can a defendant in an action for conversion, where the complaint contains only the simple allegation of title in plaintiff, prove, under a general denial, that the sale under which plaintiff claims title was void, so as to pass no title, by reason of fraud?

The general rule is, that "anything that tends to controvert directly the allegations in the complaint may be shown under

the general denial": *Bond v. Corbett*, 2 Minn. 209 (248). Upon this rule it is held that, in an action in replevin or for conversion, a denial of the simple allegation of plaintiff's title will admit proof of title in defendant or a third person: *Caldwell v. Bruggerman*, 4 Id. 190 (270); *Jones v. Rahilly*, 16 Id. 283 (320); *McClelland v. Nichols*, 24 Id. 176; *Robinson v. Frost*, 14 Barb. 536; *Davis v. Hoppock*, 6 Duer, 254; *Emerson v. Thompson*, 59 Wis. 619; for such proof directly controverts the allegation of plaintiff's title in the complaint. In the case of a sheriff, defendant, who seeks to justify his taking under process, on the claim that the sale to plaintiff was in fraud of the creditors of the person against whom the process runs, it has been held that a general denial of plaintiff's title is not sufficient: *Frisbee v. Langworthy*, 11 Id. 375. The rule in this state, in the case of an officer justifying under process, is stated in *Kenney v. Goergen*, 36 Id. 190, to be, that, under the denial of plaintiff's title, and the allegation of title in the person against whom the process runs, he may, without specially pleading it, show fraud as to creditors in the sale by such person to plaintiff. There is some reason for requiring from the officer, in such a case, somewhat fuller pleading than from the defendant in a case like this. A sale in fraud of creditors is valid and effectual, and passes the title as between the parties. Only creditors who are defrauded by it can avoid it, and there is some reason for requiring one who seeks to avoid it to put himself in the place of a defrauded creditor. But in a case like this, if the facts be as defendants sought to prove them, the sale was void, and Larson got no title. As between the parties to the sale and to the action, it remained in defendants, unless plaintiff is a *bona fide* purchaser. A general denial puts in issue only the facts alleged in the complaint. Thus, if this complaint, instead of alleging plaintiff's title, had alleged the facts through which it was derived,—as, had it alleged the sale by defendants to Larson, and title derived by plaintiff from him,—a general denial would enable defendants only to disprove those facts, but not to prove other facts to vary their legal effect. In such case, the fraud could not have been proved without pleading it. The case would then have been analogous to *Finley v. Quirk*, 9 Minn. 179 (194), 86 Am. Dec. 93, in which a denial of the sale of a horse was held to raise an issue only on the sale in point of fact, and did not justify evidence that it was made on Sunday, so as to be illegal. Under

the denial in that case, the defendant might have followed any line of evidence that would have disproved the sale in point of fact. So, under a denial of the pleadable fact of title, the defendant may introduce any evidence that will disprove such alleged fact. In many cases it might put a defendant to great disadvantage if, when the complaint alleges only the fact of title, without disclosing by what means plaintiff claims to have acquired it, defendant must anticipate plaintiff's evidence as to the source of title, and plead expressly facts to do away with the effect of it.

It was error to exclude the evidence offered, and there must be a new trial.

Order reversed.

PLEADING — EVIDENCE ADMISSIBLE UNDER GENERAL DENIAL: *Indianapolis R. R. Co. v. Rutherford*, 29 Ind. 82; 92 Am. Dec. 336; *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214; 92 Am. Dec. 529.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PEOPLE v. BLIVEN.

[112 NEW YORK, 79.]

INDICTMENT — PRINCIPALS IN CRIME. — PERSON NOT PRESENT AT THE COMMISSION OF A CRIME, BUT WHO COUNSELED, INDUCED, AND PROCURED it to be committed, may, under the provisions of section 294 of the Penal Code of New York, be convicted under an indictment charging him with the commission of such crime.

ACCESSARIES BEFORE THE FACT, IN CASES OF TREASON AND OF MISDEMEANOR, ARE PRINCIPALS, by the rules of the common law.

ACCESSARIES BEFORE THE FACT IN THE COMMISSION OF A FELONY MAY BE INDICTED AND CONVICTED AS PRINCIPALS, under section 29 of the Penal Code of New York. That section reads as follows: "A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces, or procures another to commit a crime, is a principal."

INDICTMENT and conviction under section 294 of the Penal Code of New York, defining the crime of abortion.

Abraham Suydam, for the appellant.

John F. Clark, for the respondent.

PECKHAM, J. Section 294 of the Penal Code provides as follows: "Abortion defined. A person who, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve the life of the woman, or of the child with which she is pregnant, either: 1. Prescribes, supplies, or administers to a woman, whether pregnant or not, or advises or causes a woman to take any medicine, drug, or substance;

or 2. Uses or causes to be used any instruments or other means,—is guilty of abortion, and is punishable by imprisonment in a state prison for not more than four years, or in a county jail for not more than one year.”

Under that section the defendant was indicted by the grand jury of the county of Kings for having feloniously, etc., used a certain instrument upon the prosecutrix with intent thereby feloniously and unlawfully to procure her miscarriage, the same not being then and there necessary to preserve her life, or that of the child with which she was pregnant.

The proof in the case showed that at the time of the commission of the act the defendant was absent, but that he had counseled, induced, and procured the crime to be committed. The question was properly raised on the trial, and the claim was made, on the part of the counsel for the defendant, that he could not be convicted of the crime alleged in the indictment, because the proof showed that he was absent at the time of its alleged commission, and hence there was not within the meaning of the code a sufficient allegation in the indictment of the facts constituting the crime as proved. The objections were overruled, and the defendant was convicted and sentenced. Upon appeal, the conviction was affirmed by the general term of the supreme court, and from the judgment of affirmance the defendant appealed here.

The question is now fairly presented, whether upon an indictment which alleges the doing of an act by the defendant constituting the crime, he can be convicted upon proof that, though absent at the time of the actual commission of the crime, he nevertheless aided in, advised, and procured its commission.

Before the adoption of the code, and in cases of felony, there would have been no doubt that a conviction could not be had upon an indictment such as this, where the proof was the same as in this case. It is claimed, however, that section 29 of the Penal Code works a change in the law upon this subject. That section is as follows: “A person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces, or procures another to commit a crime, is a principal.”

It is now argued that by reason of this section the rule of law has been changed, and that upon an indictment alleging

that the defendant committed the crime named in the indictment, he may be convicted upon proof that, though absent, he advised and procured its commission. The purpose and effect of the section are to abolish the distinction which heretofore existed in cases of felony between a principal and an accessory before the fact, the principal being present and either committing the act himself or aiding in its commission, and the accessory before the fact being absent but counseling and procuring its commission. The case of an accessory before the fact has now, by means of this section, been made the case of a principal, and he occupies, therefore, the same position in the case of felony as such an individual heretofore occupied in cases of treason and of misdemeanor. In treason it has always been the law that there were no accessories either before, or, with one or two minor exceptions, after, the fact: 1 Hale P. C. 223; 1 East P. C. 93, sec. 35; 1 Bishop's Crim. Law, sec. 681; 1 Wharton's Crim. Law, sec. 131. In regard to misdemeanors, the same rule obtains, and when one sustains in misdemeanor a relation to an act which in felony would make him an accessory before the fact, he is treated as a principal, and the indictment charges him as such, and unless the pleader chooses, it does not mention that the act was committed by another: 1 Bishop's Crim. Law, secs. 685, 686. The rule, therefore, in cases of felony can scarcely be said to exist simply because of the greater gravity of the offense charged, for as it does not exist in treason, which according to the English law is the highest crime known to it, the gravity of the charge cannot be the reason for its existence in cases of felony. It is somewhat difficult to comprehend the reason for the difference in the rule between cases of treason and misdemeanor on the one hand and felony on the other. Nor can the smallness of the offense in cases of misdemeanor be the reason for the existence of the rule. For by the common law many cases which are made felony in this country by statute were but misdemeanors, the punishment, however, in many of them extending to long terms of imprisonment, and also to the infliction of corporal punishment.

As late as the case of *Regina v. Greenwood*, 9 Eng. L. & Eq. 535, which was a case where the prisoner was indicted for uttering counterfeit coin, the crime being a misdemeanor, the rule was applied. The indictment in that case charged the prisoner with knowingly uttering a counterfeit shilling. The proof was, that it was uttered by another person in the

absence of the prisoner; and the court held that the prisoner was properly convicted under the indictment. The conviction was held good, on the ground that the proof showed that the prisoner, although absent when the coin was uttered, was engaged in the common purpose of uttering counterfeit shillings, and the act of uttering the coin in question having been procured and aided by the prisoner, the case stood the same as if it were his own act. Five judges delivered opinions *seriatim*, and although they are exceedingly brief, the case shows that it was carefully examined, and must be regarded as high authority upon the question decided.

Another case is that of *Regina v. Clayton*, 47 Eng. Com. L. 128. The indictment charged the prisoners with an attempt to set fire to a certain malt-house, and they were jointly charged in the indictment with having made such attempt. The proof showed that Mooney was not present when the other prisoner lighted the fire, but it tended also to show that, though absent, she knew beforehand that the fire was to take place. The question was raised on the part of the prisoner Mooney that she could not be convicted under the indictment, as it charged her with the actual attempt to burn the malt-house, while the proof showed that she was absent, although privy to the act. The objection was overruled, and it was stated by the learned judge in summing up that in misdemeanors and in treason all who take part in the crime are principals, and that the prisoner Mooney might be convicted under the indictment, which alleged that she herself attempted the crime if, though absent, the jury believed that she counseled and encouraged the other prisoner to set the fire.

The same rule has been held to exist in this state. In *Ward v. People*, 6 Hill, 144, the indictment charged the prisoner with having stolen twenty-five pounds of butter. On the trial he gave evidence tending to prove that he did not himself steal the butter, but sent another person to steal it, and that they afterwards divided it between them, and he requested the court to charge the jury that if the butter was thus stolen, he was simply an accessory, and could not be convicted as a principal for the crime of petit larceny. The court refused, and charged that if the other person stole the butter in the prisoner's absence by his advice and procurement, he might be convicted under the indictment as a principal, as there were no accessories in petit larceny. The supreme court held the conviction proper (*Ward v. People*, 3

Hill, 395), and the conviction was affirmed by the court of errors, Chancellor Walworth writing the opinion. The doctrine was there stated that those who procure, aid, or advise in the commission of the offense of petit larceny are principals, and that the same rule obtains in cases of treason.

In England, by the statute 11 and 12 Victoria, chapter 46, section 1, for the purpose, as is stated in the preamble, of relaxing the technical strictness of criminal proceedings, and to insure the punishment of the guilty without depriving the accused of any just means of defense, it was enacted that "if any person shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted, and punished in all respects as if he were a principal felon."

The same provision is reiterated in 24 and 25 Victoria, chapter 94, section 1. It would seem that the provisions of these statutes established the same rule in cases of felony as in cases of treason and misdemeanor, and that an indictment against a person who before the statute would have been regarded as an accessory before the fact in a case of felony, would now charge the crime against him in precisely the same manner as if he were a principal felon. And a person charged with the commission of a felony would, under those statutes, be convicted on proof showing him guilty as an accessory before the fact. It has, indeed, been so decided.

In the case of *Regina v. Manning*, 2 Car. & K. 892, 904, 61 Eng. Com. L., it appeared that two persons, who were husband and wife, were charged as principals in the crime of murder. The recorder of London, in his charge to the grand jury with reference to the case, said: "The material question in this case is, whether this woman has taken such a share in the transaction as to make her an accessory before the fact, or whether she was present when the crime was committed, in either of which cases she will be liable under the statute 11 and 12 Victoria, chapter 46, section 1, to be indicted as a principal in the murder. It will be for you to consider, therefore, whether there is any evidence of a counseling or procuring the murder to be committed by either of the parties accused, and more particularly by the woman. . . . The indictment will probably charge both these persons, husband and wife, as principals in the commission of the crime, and by the statute to which I have referred, both classes of

offenses, namely, that of an accessory before the fact and that of a principal, may now be dealt with alike in the mode of indictment and trial. And proof of a party being either an accessory before the fact, the perpetrator of the crime, or that he was present aiding and abetting in the commission of it, will support an indictment charging him as a principal."

Under these circumstances, the question arises whether it was not meant by the passage of section 29 of the Penal Code to place a person, who in cases of felony would otherwise have been guilty as an accessory before the fact, under the same rule as had heretofore obtained in cases of treason and misdemeanor. The general rule of law is, as stated by Mr. Bishop, that what one does through another's agency is to be regarded as done by him: 1 Bishop's Crim. Law, secs. 656, 673, 682.

If the case were a civil one, a pleading which alleged the doing of an act by the defendant would be sustained upon proof of the doing of the act by his agent, or by any one whom he advised or requested to do it, and it is difficult to see why, under an indictment charging the defendant with the commission of a crime, proof, showing its commission by one whom he advised and procured to do it, would not prove his own guilt of the act charged. By section 275 of the Code of Criminal Procedure, it is enacted that the indictment must contain a plain and concise statement of the act constituting the crime without unnecessary repetition; and by section 284, subdivision 7, it is stated that the indictment is sufficient if the act or omission charged as a crime is stated with such a degree of certainty as to enable a court to pronounce judgment upon conviction, according to the rights of the case. Here the act constituting the crime was the insertion of an instrument in the body of the prosecutrix, and thereby procuring an abortion. That act was plainly charged against the defendant, and in order to prove it, evidence was given of the commission of the act by another by the defendant's advice and procurement, but in his absence. The act that rendered him guilty is charged in the indictment, and it was not a case of variance between the crime as charged and the proof as made.

We think the case of *People v. Dumar*, 106 N. Y. 502, has no application. The indictment in that case charged the defendant with the crime of grand larceny, in unlawfully stealing and carrying away the property described. The proof was,

that the defendant obtained possession of the property from the owner by sale upon credit, induced by false and fraudulent representations. We held that there was a variance between the proof and the indictment, and that the defendant was left uninformed of the real act committed by him. There was no question in that case in regard to the act charged having been done by a third person in the absence of the defendant, but by his act and procurement. The crime charged was a totally different one from that which the facts proved, although both were grand larceny. The indictment, however, charged one set of facts as constituting grand larceny, and the proof was of a totally different set of facts, which, by the code, also constituted grand larceny. The difficulty was, that the crime as charged was not proved, and the crime as proved was not charged.

Here, as it seems to us, the crime was clearly and properly charged, and the proof shows the defendant to have been guilty of the very act with the commission of which the indictment charged him. It was proved by showing that the act, although committed by a third person, and in the absence of the defendant, was so committed by his aid and procurement, and in that way, in law and in morals, and in good sense, he committed the act himself. This question has been raised in some of the other states where provisions somewhat similar to the section of our Penal Code have been in existence for some years. The case of *People v. Outeveras*, 48 Cal. 19, is one which arose under the California statute, which somewhat resembles ours. The prisoner was indicted for the crime of burglary, in breaking into and entering a dwelling-house in the daytime, intending to commit larceny. The proof showed that the entry was made by another than the prisoner, but pursuant to an arrangement with him, and he being near by the house at the time of the entry, and aiding and abetting it. The facts showed that he might have been regarded as a principal in the second degree, as one who stood by and aided and abetted the commission of the act. But the court regarded the question in the same manner as if the proof had shown that the prisoner was absent at the time of the commission of the act, but that he had counseled and procured its commission. The California statute is as follows: "An accessory is he or she who stands by and aids, abets, or assists, or who not being present aiding, abetting, or assisting, hath advised or encouraged the commission of the crime. He

or she who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal, and punished accordingly." The court held that, under the indictment charging him with the commission of the act, the prisoner could be convicted by proof that he was present aiding and abetting, or absent and advising and procuring its commission. This case substantially overrules the case of *People v. Campbell*, 40 Cal. 129, and that of *People v. Trim*, 39 Id. 75, and states, as we think, the better rule on the subject.

In Illinois, the same view has been taken of a similar statute. By the thirteenth section of the Criminal Code of Illinois, it is declared that "an accessory is he or she who stands by and aids, abets, or assists, or who not being present aiding, abetting, or assisting, hath advised or encouraged the perpetration of the crime. He or she who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal, and punished accordingly." The effect of this section came before the supreme court of Illinois for decision in the case of *Baxter v. People*, 8 Ill. 368. The prisoner was indicted for murder, and the proof tended to show that he was not present at the time of the commission of the crime, but had advised and procured its commission, and it was held that the section of the Criminal Code above quoted had abolished the distinction between accessories before the fact and principals, and that, as accessories before the fact were by such section to be deemed as principals, and punished accordingly, they should be indicted as principals.

In *Dempsey v. State of Illinois*, 47 Ill. 323, the same question again came before that court, the prisoner having been indicted for murder, and the proof showing that he was guilty as accessory before the fact. The court stated: "It is contended that in such a prosecution the prisoner should have been indicted as an accessory before the fact, and having failed to do so, the people should be precluded from establishing his guilt in that mode. Our statute declares an accessory before the fact to be a person who stands by and aids, abets, or assists, or who not being present, aiding, abetting, or assisting, hath advised and encouraged the perpetration of a crime; and that a person thus aiding, abetting, or assisting, and advising or encouraging, shall be deemed a principal, and punished accordingly. The statute having declared such persons principals, no reason is perceived why they may not be indicted as such."

The court then referred to the case of *Baxter v. People*, *supra*, and added: "These cases are decisive of the question, nor do we see any sufficient reason to overrule those cases. They have long stood unshaken as the law of the land, and unless we could perceive some great and urgent necessity for their being overturned, we are not inclined to overrule or shake their authority": See also *Spies v. People*, 122 Ill. 1, 101, 242; 3 Am. St. Rep. 320.

The statute of Michigan abrogates the distinction between an accessory before the fact and a principal, and all who would be accessories before the fact at common law are to be indicted, tried, and punished as principals. Another statute provided that if the father or mother of any child, or any other person to whom it was confided, exposed it with intent to abandon, such person was to be punished as therein provided. The prisoner, who was neither the father, mother, or person to whom the child had been confided, was indicted as a principal under the statute. The proof only showed that he had counseled and aided and abetted the act of abandonment, but was not present when it was committed. The court held that where the prisoner could not be guilty of the substantive or main offense whose commission he aided,—that is, where it was a legal impossibility for him to commit it,—that in such case the aiding and abetting was the principal offense, and he must be indicted as having committed that specific offense, and the indictment must charge the acts of aiding and abetting. This is the principle decided in *Shannon v. People*, 5 Mich. 71. It does not touch the point in this case.

In *Smith v. State*, 37 Ark. 274, the question is briefly discussed and decided in accordance with the defendant's claim here, chiefly on the authority of the two cases in California (*People v. Trim*, 39 Cal. 75; *People v. Campbell*, 40 Id. 129); but the authority of such cases is overturned by the later case, cited in the same state, of *People v. Outeveras*, 48 Id. 19.

The statute of Arkansas is somewhat peculiar. An accessory before the fact is defined by the Revised Statutes of that state (R. S., sec. 44, p. 248), and it is declared that "he who thus aids, assists, abets, advises, or encourages, shall be declared in law a principal, and punished accordingly." In *Williams v. State*, 41 Ark. 173, the court simply said that accessories before the fact are punishable as principals, but must be indicted as accessories, and referred to the former case of *Smith v. State*, *supra*.

We are inclined to agree with the English rule and with the reasoning of the learned judges of California in the latest cited case, and with those of Illinois. The court in Michigan does not hold any contrary doctrine. When we remember that the distinction taken between an accessory before the fact and a principal does not exist either in cases of treason or misdemeanor, and that in England, where the distinction had its origin, cases of misdemeanor were sometimes of very grave character, involving imprisonment for years, and that the reason for the existence of the distinction in cases of felony is neither very clear nor very satisfactory, as given by the older writers, Blackstone and Coke, we cannot fail to be impressed with the view that the legislature of this state, in abolishing the distinction and in making an accessory before the fact a principal in cases of felony as well as in cases of misdemeanor, meant to make the law in regard to the statement of the offense the same in all cases; and that what would be a proper indictment in a case of ordinary misdemeanor, as held by our courts for a long number of years, would be a proper one in a case of felony.

Where the statute, in defining what constitutes a principal in the commission of a crime, includes one who counsels its commission, although absent at that time, we do not lay any stress on the presence or absence of a provision that he shall be indicted or punished as such. If he is made a principal, we think it follows that it would be proper to so indict him, unless, indeed, in such a case as the one in Michigan, where the only offense that the defendant could commit was the substantive and separate one of advising the commission of the principal offense.

The kind of pleading of which this incitement is an example receives the unqualified approval of Mr. Bishop, whose ability as a writer on the subject of criminal law is admitted by all: 1 Bishop on Criminal Law, sec. 682. We think we are treading in the same direction that the legislature intended by the passage of the Penal Code and the Code of Criminal Procedure. The tendency of modern thought as exhibited in criminal legislation is to free the practice from mere technicalities, and to bring to the trial of the indictment the very merits of the issue between the people and the defendant, and in the plainest and least formal style.

The only objection that could be urged against an indictment in this form is the possibility of misleading the defend-

ant as to the nature or character of the act of which he is accused. It was that objection that seemed so weighty in the eyes of that most learned and able judge, Chief Justice Marshall, as we learn from his views expressed upon that point in the trial of Aaron Burr for treason, although at the same time he admitted the existence of the rule: 4 Cranch, 469, 497.

But, upon reflection, we think the objection is more fanciful than real, and if it be understood that upon an indictment of this nature a man may be convicted upon proof, not only of his doing the act with his own hand, but upon proof that he advised and procured another to do it, and thus did it himself, we think no man will suffer any real inconvenience or any injustice from such a rule.

The general policy throughout this country and England runs in favor of more liberal views, at the present time, in regard to the treatment of those technicalities which formerly existed as obstructions in the path of the enforcement of the criminal law. That policy is shown by the passage of such acts as have been cited as well from England as from other states in the Union. It was stated in the English statutes, which made the alteration already referred to, that it was made "to insure the punishment of the guilty without depriving the accused of any just means of defense," and we think that the abolition of all distinction between principals in the first and second degree and accessaries before the fact does tend in that direction.

By holding this indictment to be insufficient to admit proof of the defendant's guilt, by reason of his procuring and advising the act to be done instead of doing it himself, we think we should be taking a step backwards in regard to the proper rules which should obtain in criminal pleadings, and that our decision would be at war with the general policy which led to the adoption of the Penal Code, and especially at war with the sections of the code already quoted.

We think that no injustice has been done, that the indictment was sufficient to permit the proof given, and that the defendant was legally convicted of the crime charged.

The judgment should be affirmed.

ACCESSARIES BEFORE THE FACT MAY BE INDICTED and punished as principals, under the statutes of Illinois: *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320.

ACCESSARY AFTER THE FACT, WHO IS: *Harrel v. State*, 39 Miss. 702; 80 Am. Dec. 95, and note 97.

AIDERS AND ABETTORS CANNOT BE INDICTED OR PUNISHED under a statute which creates a felony, unless the statute applies to all who are guilty, and not alone to the person actually committing the acts constituting the offense: *Frey v. Commonwealth*, 83 Ky. 190.

LONDON v. TOWNSHEND.

[112 NEW YORK, 93.]

JUDGMENT. — NO PERSON CAN BE EFFECTED BY A JUDICIAL DECREE UNLESS A PARTY THERETO, either individually or by representation.

MORTGAGE FORECLOSURE. — OWNER OF EQUITY OF REDEMPTION IS AN INDISPENSABLE PARTY TO A SUIT for the foreclosure of a mortgage, and if the suit proceeds without his being made a party, the decree cannot affect his title.

FORECLOSURE. — THE TITLE OF AN ASSIGNEE IN BANKRUPTCY held by him in his official capacity is not affected by a foreclosure to which he is made a party defendant, but apparently in his personal capacity only, and without any statement in the complaint showing that it was intended to proceed against him as the assignee in bankruptcy of the original mortgagor.

EJECTMENT.

John Townshend, for the appellants.

William D. Page, for the respondents.

ANDREWS, J. The appellants rest their appeal, as they rested their defense on the trial, upon the claim that the plaintiffs failed to establish title in themselves to the premises in controversy. The trial court found and the judgment there and at the general term proceeded on the ground that the plaintiffs had the legal title to the lots in question, and the correctness of this conclusion is the question now to be determined. It is undisputed that on the 23d of March, 1836, John Scudder, the then owner of the lots in controversy, conveyed them to Ebenezer L. Williams, subject to a mortgage thereon for one thousand dollars, executed by Scudder to Edward Price, September 5, 1835, and recorded on the same day. By a decree of the United States court for the southern district of New York, made February 4, 1843, under and pursuant to the bankrupt act of 1841, Williams was adjudicated a bankrupt, and one William C. H. Waddell, who was the general and

official assignee in bankruptcy in cases arising in that district, became *virtute officii* the assignee of Williams. Williams owned the lots from March 23, 1836, the date of his conveyance from Scudder, to the time of his bankruptcy. The Scudder mortgage was outstanding and unpaid. Under the bankrupt act of 1841, Williams's title to the mortgaged premises vested by operation of law without any assignment in Waddell as assignee: Sec. 3. But the assignee took the title, as theretofore it had been held by Williams, subject to the mortgage. The plaintiffs claim title under a foreclosure of the Scudder mortgage in an action brought by the administrator of Price, November 20, 1858.

The title of the plaintiffs, as presented by the record, depends upon the efficacy of the foreclosure judgment and the sale thereunder to bar the equity of redemption of Waddell, the assignee in bankruptcy, and those whom he represented. In the title of the foreclosure action the parties were designated, "William Coulter, administrator of the estate of Edward Price, deceased, v. Rhoda Williams and William H. C. Waddell." The complaint set out the death of Price, the mortgagee, the appointment of the plaintiff as his administrator, the execution of the bond and mortgage, the amount due and unpaid thereon, a description of the mortgaged premises, and contained the usual general averment that the defendants had, or claimed, some interest in the mortgaged premises subsequent to the mortgage, together with a special allegation that on or about December 1, 1838, Price, the mortgagee, instituted proceedings in the court of chancery to foreclose the mortgage, but that the defendants, or either of them, were not made parties thereto, "although the defendant Waddell had theretofore, and since the execution and delivery of such mortgage, become seised of the interest of said Scutter in said premises," and "that the claim, right, or title in such premises of these defendants was obtained under and through the said John Scudder since the execution and delivery of said bond and mortgage." Both defendants appeared in the action by the same attorney, December 1, 1858, who afterwards, on the twenty-second day of December, 1858, consented to a reference to compute the amount due, and this was followed by final judgment of foreclosure December 31, 1858. There was no answer in the action and no appearance therein by Waddell as assignee, the notice of appearance served by the attorney being in the general form, specifying that he appeared "for the defendants in

the action." The premises were sold pursuant to the judgment January 28, 1859, and were conveyed to the plaintiff's testator (the assignee of the purchaser), on the same day.

Upon these facts the question arises whether the judgment of foreclosure of January 28, 1859, and the sale thereunder, barred the equity of redemption of Waddell as assignee of Williams, and cut off the Williams title. There was no reference in the summons and complaint to Waddell's official character, nor any suggestion, so far as the record shows, at any stage of the proceedings, as to the nature of his title or interest in the premises. In form, the action was against him as an individual. His appearance was in his individual and not in his representative character. The judgment followed the prior proceedings, and adjudged that "the defendants" be forever barred and foreclosed of all right, title, interest, or equity of redemption in the mortgaged premises, making no reference to his official character or title. We are of opinion that the foreclosure was ineffectual to bar the equity of redemption of Waddell as assignee in bankruptcy. It is a fundamental doctrine of jurisprudence that all persons whose interests are to be affected by a judicial decree must be made parties, either individually or by representation, to the proceeding, or have (what in some cases is equivalent) notice, so that they may have an opportunity to be heard, and that as to such persons a judicial sentence, pronounced without their presence or an opportunity to be heard, is a nullity. The owner of the equity of redemption in the mortgaged property is, therefore, a necessary party to a suit for a foreclosure of the mortgage, and if the suit proceeds without his being made a party, his title is not affected by the decree: *Reed v. Marble*, 10 Paige, 409; *Winslow v. Clarke*, 47 N. Y. 261. In the case last cited, this doctrine was applied to an attempted foreclosure of a mortgage on the real estate of a bankrupt commenced after the bankruptcy, to which foreclosure the assignee was not made a party, and it was held that his title was unimpaired by the proceeding.

The precise question here is, whether the fact that Waddell was named as defendant in the foreclosure action and was served with process, he not being named in the process as assignee in bankruptcy, and there being no averment in the complaint of his official character, and no appearance or answer by him as assignee, the judgment concludes the bankrupt's estate, and bars the equity of redemption vested in

Waddell as assignee in bankruptcy at the time of the foreclosure. It is unquestionable that upon the bankruptcy of Williams his title passed to his assignee. But the assignee took and held it in his official and representative capacity, having no private, individual, or beneficial interest of any kind. The assignee was a trustee of the property for the creditors of the bankrupt, and they and the bankrupt were the only persons beneficially interested in the land. The lien of the Scudder mortgage was not affected by the bankruptcy, although the remedy in the state courts by foreclosure might depend upon obtaining the consent of the bankruptcy court to its enforcement, and in the absence of proof, such consent will be presumed in support of the judgment of foreclosure. But the insuperable difficulty here is, that Waddell was not made a party to the foreclosure in his representative character. The general equitable rule requires that in an action affecting trust property, the *cestui que trust* as well as the trustee is a necessary party, and it applies in mortgage cases as well as others: Story's Eq. Pl., secs. 197, 207; *Rogers v. Rogers*, 3 Paige, 379; *Williamson v. Field*, 2 Sand. Ch. 533; *Lockman v. Reilly*, 95 N. Y. 64.

It is not important to inquire how far this rule has been modified by the present Code of Procedure. The existence of the rule shows the care taken by the courts in protecting the interests of persons interested in trust estates. There is an exception to the rule in case of voluntary general trusts for the benefit of creditors growing out of the difficulty in joining all the creditors, and in such case it is sufficient to bring in the trustee, and the creditors will be bound on the principle of representation. The same exception, and for the same reason, exists in bankruptcy; and it is only necessary to make the assignee a party to a foreclosure or other suit affecting the real property of the bankrupt in his hands: Story's Eq. Pl., sec. 197. But to bind the estate of a bankrupt in the hands of his assignee by an adversary judicial proceeding, or by a judgment of foreclosure in a suit commenced after the bankruptcy, it is, we think, indispensable that the suit or proceeding should have been brought against the assignee distinctively in his representative and official character, or, at least, that it should in some way appear on the face of the proceedings that they related to or affected the bankrupt's estate, and that it is not sufficient that the assignee is individually named in the process or pleadings, without any averment of his representative

character. This is, we think, in accordance with the general tenor of adjudication: *Rathbone v. Hooney*, 58 N. Y. 465; *Fisher v. Hubbell*, 65 Barb. 74; *Merritt v. Seaman*, 6 N. Y. 171; *Van Cott v. Prentice*, 104 Id. 45; *Colt v. Colt*, 111 U. S. 566; *Gillet v. Fairchild*, 4 Denio, 80. The papers served on Waddell gave him no notice that the suit related to the property of the bankrupt. The statement made in the complaint was in fact misleading, since it alleged that his title or interest, whatever it was, accrued under Scudder prior to December 1, 1838, and consequently before the passage of the bankrupt act. Whether Waddell, in fact, knew that the foreclosure related to land owned by Williams does not appear. The fact, however, is immaterial. The decisive point is, that the owner of the equity of redemption was not brought in, and that the representative interest of Waddell was not involved in a suit in which he was named simply as an individual. It would, we think, be an unwise rule, and one not authorized by adjudged cases, to permit beneficial interests in trusts of this character to be affected by such loose proceedings as were taken in this case.

These views lead to a reversal of the judgment. Whether the plaintiff can maintain the action upon any ground other than his title under the foreclosure, we do not consider.

The judgment should be reversed and a new trial ordered.

JUDGMENTS AND DECREES ARE BINDING upon parties and privies only: *Blue v. Blue*, 38 Ill. 9; 87 Am. Dec. 267; *Cecil v. Cecil*, 19 Md. 72; 81 Am. Dec. 626; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289; 21 Am. Rep. 417; *Hanley v. Danson*, 16 Or. 344.

ONE CLAIMING IN PRIVITY WITH ANOTHER, WHETHER BY BLOOD, ESTATE, OR LAW, OCCUPIES the same situation with such other as to any judgment for or against him, and the record of the judgment is equally admissible as evidence against either: *Woods v. Montevallo etc. Co.*, 84 Ala. 560; 5 Am. St. Rep. 393.

DECREE IS BINDING UPON WHOLE CLASS OF SUITORS, where the rights of the whole class were, at the hearing, fairly represented and fully and honestly maintained and tried: *Dewey v. St. Albans Trust Co.*, 60 Vt. 1; 6 Am. St. Rep. 84.

DECREE FOR MECHANIC'S LIEN AGAINST A WIFE, in a proceeding in which the husband is not made a party, is not binding on him: *Price v. Hudson*, 125 Ill. 284.

IF MORTGAGOR HAS DISPOSED OF HIS INTEREST, HIS GRANTEE ONLY need be made party to foreclosure proceedings: *Boutwell v. Steiner*, 84 Ala. 307; 5 Am. St. Rep. 375, and note 377.

ASSIGNEE IN BANKRUPTCY, APPOINTED PENDING A SUIT TO FORECLOSE A MORTGAGE on lands of the bankrupt, will be bound by the decree and sale made in such suit, whether he is made a party to such suit or not: *Mount v. Manhattan Co.*, 43 N. J. Eq. 25.

BRILL v. WRIGHT.

[112 NEW YORK, 129.]

LEGACIES, WHEN NOT CHARGEABLE AGAINST RESIDUARY DEVISEE. — General language in a will giving legacies, followed by the usual residuary clause, is not alone sufficient to charge the legacies on the realty, but such language will justify such charge if it is made to appear by extrinsic circumstances — such as may, under the rules of law, be resorted to to aid in the interpretation of written instruments — that it was the testator's intention that the legacies should be charged on the land.

INTENT TO CHARGE LEGACIES UPON THE REALTY CANNOT BE INFERRED from the fact that, after the usual introductory clause, the will proceeds as follows: "First, after all my lawful debts are paid and discharged, I give and bequeath to J. S. the sum of two thousand dollars. Secondly, I give and bequeath all the rest and residue of my real and personal estate to J. C."

BURDEN OF ESTABLISHING THAT A LEGACY IS TO BE CHARGED AGAINST THE REAL ESTATE rests upon the legatee who is seeking to have such charge imposed.

ACTION for the payment of legacy, and in the event of the personal estate being insufficient, to have the deficiency charged upon real estate. Judgment for plaintiff, which was affirmed by the general term.

C. B. Herrick, for the appellants.

O. D. M. Baker, for the respondent.

ANDREWS, J. Where in a will general legacies are given, followed by a gift of all the rest and residue of the real and personal property of the testator by a residuary clause in the usual form, and nothing more, it must now, we think, be regarded as the established rule in this state that the language of the will alone, unaided by extrinsic circumstances, is insufficient to charge the legacies upon lands included in the residuary devise. This was clearly the opinion of Chancellor Kent in the leading case of *Lupton v. Lupton*, 2 Johns. Ch. 614, as appears by his comment on the case of *Brudenell v. Boughton*, 2 Atk. 268, although his judgment in that case rested in part upon the circumstance that in the will then under consideration there was a prior devise which easily permitted an interpretation, *reddendo singula singulis*, of the residuary clause. In *Hoyt v. Hoyt*, 85 N. Y. 142, Folger, C. J., referring to *Lupton v. Lupton*, *supra*, and other cases, justly stated that they asserted the doctrine that, "unaided and alone, the words that make up the usual residuary clause of a will are not enough to evince an intention in the testator to charge a general legacy upon real estate," but the question

was not passed upon in that case. The courts, however, have held that a gift of general legacies, followed by a general residuary clause, is not inconsistent with an intention on the part of a testator to charge the legacies on the land. They have, therefore, permitted extrinsic circumstances to be considered for the purpose of ascertaining the actual intention of the testator, and in some cases, by reading the language of the will in the light of the circumstances, have inferred an intention to charge legacies on the land, and given effect to such intention, although the language, considered independently of the circumstances, would not alone justify such an inference.

The cases of *Wiltsie v. Shaw*, 100 N. Y. 191, and *McCorn v. McCorn*, 100 Id. 511, illustrate very clearly the attitude of this court upon the subject. Both were cases substantially of wills giving general legacies, followed by the usual residuary clause. In each the question was, whether the legacies were charged on the land. In *Wiltsie v. Shaw*, *supra*, it appeared that the testator left a large personal estate, ample for the payment of debts and legacies, and no other circumstance appearing, it was held that a legacy given by the testator in his will, in trust for a son, was not a charge on the lands, which passed to the testator's daughter under the residuary clause. In *McCorn v. McCorn*, *supra*, the legatees were the wife and son of the testator, and the gift of the legacies was followed by the usual residuary clause, under which all the testator's real estate passed to four other children. It appeared that the will was made the day before the testator's death, and that his personal estate was insufficient to pay his funeral expenses. The legacies to the testator's wife and son were mere pretenses, "unless meant to be a charge on the real estate." Under these circumstances the court held that the legacies were intended to be charged on the realty, and sustained the claim of the legatees.

We think the cases in this state establish these two propositions: 1. That general language in a will, giving legacies, followed by the usual residuary clause, is alone insufficient to charge the legacies on the realty; and 2. That such language will justify such charge if it is made to appear by extrinsic circumstances, such as may under the rules of law be resorted to, to aid in the interpretation of written instruments, that it was the testator's intention that the legacies should be charged on the land. The rule in England, and in some of the states in this country, and in the United States supreme

court, is different from the rule in this state. The cases are cited in *Hoyt v. Hoyt*, *supra*. In *Greville v. Browne*, 7 H. L. Cas. 689, it was regarded as having been long settled in England that where legacies are given generally, and the rest and residue of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real as well as the personal estate. But some of the judges were of the opinion that if the question was *res nova*, the natural construction of the language would lead to the opposite conclusion.

Under the rule in this state we think the legacy of two thousand dollars given by the will of Job Seaman to his nephew, Job S. Benjamin, was not charged on the real estate which passed under the residuary clause to James O. Cronk and Matilda Cronk. The will is very simple, and is partly printed and partly written. After the usual introductory clause, the will proceeds as follows: "First, after all my lawful debts are paid and discharged, I give and bequeath to Job S. Benjamin the sum of two thousand dollars, to be paid to him within three months after my decease. Secondly, I give and bequeath all the rest and residue of all my real and personal estate, of whatsoever name or nature, to James O. Cronk and Matilda Cronk, to each the one-half part thereof. Likewise I make, constitute, and appoint William H. Wright" executor, etc. It is claimed that the words in the first clause, viz., "After all my lawful debts are paid and discharged, I give," etc. (which were printed), indicate an intention to constitute the whole estate, real and personal, a fund for the payment in the first instance of the debt and legacy. The direction as to the payment of debts was formal and conventional merely. The law charges the debts of a decedent upon his real estate, if the personal estate is insufficient to pay them. The debts owing to the testator amounted only to \$114.11, and his personal property was appraised at \$2,643.07, and produced \$3,553.36. Similar language was in the will considered in the case *In re Rochester*, 110 N. Y. 159, and was held insufficient to create a charge on the realty. The extrinsic circumstances do not tend to show an intention, on the part of the testator, to charge the legacy on his real estate. Except for the expenses allowed against the estate, growing out of a contest on the probate of the will, instituted by the legatee and a niece of the testator, and in subsequent proceedings on an accounting by the executor, the personal estate left by the testator would have

been ample to have paid the legacy and the ordinary expenses of administration. The legatee was of kindred to the testator, and the residuary devisees and legatees were strangers in blood. But they became members of his family when they were children, and lived with him until his death, one for the period of twenty and the other for twenty-five years. The testator's wife was infirm and crippled, and died a short time before the testator, and they had no children or direct descendants living. We perceive no circumstance which takes the case out of the general rule. The condition of the testator's property when the will was made, in 1879, four years before his death, is not shown. He was a small farmer, and it is quite probable that his circumstances had not materially changed during that time. It may be assumed that the testator intended that the legacy to his nephew should be paid. But there is no presumption that when the will was made his personal estate was not adequate for that purpose. If it was not, and the fact was material, the burden of establishing it was upon the legatee, who in this proceeding is seeking to charge the real estate, in a case where the language of the will does not affirmatively show that this was the intention of the testator. It is quite significant of his actual intention that he directs the legacy to be paid within three months after his death, and gives no power of sale to his executor.

We think the judgments below should be reversed, and a new trial granted, with costs to the executor, appellant, in all courts against the respondent, but without costs to the other defendants.

ABATEMENT OF LEGACIES IN CASE OF DEFICIENCY OF ASSETS OF ESTATE.

—When the whole of the estate left by a testator is not sufficient to pay all his debts and the legacies which he has bequeathed by his will, there must of course be a subtraction or abatement from the amounts specified in the will. Before considering the rules by which this abatement is made, it will be proper to consider the various classes into which legacies are divided. Legacies are generally classified as follows: 1. Specific; 2. Demonstrative; 3. General. To these is sometimes added a fourth, designated residuary legacies. A specific legacy is a bequest of a specific article of the testator's estate, distinguished from all others of the same kind; as, for instance, a particular horse, or piece of plate, or money in a certain purse or chest, or a particular stock in the public funds, or a particular bond or other obligation for the payment of money: 3 Pomeroy's Eq. Jur., sec. 1130; *Roper on Legacies*, 191; *Harper v. Bibb*, 47 Ala. 547; *Estate of Woodworth*, 31 Cal. 595; *Titus v. McLanahan*, 2 Del. Ch. 200; *Cooch's Ex'r v. Cooch's Adm'r*, 5 Houst. 540; 1 Am. St. Rep. 161; *Bradford v. Haynes*, 20 Me. 105; *Chase v. Lockerman*, 11 Gill & J. 185; 35 Am. Dec. 277; *Towle v. Swasey*, 106 Mass. 100; *Farnum v. Bascom*, 122 Id. 282; *Wallace v. Wallace*, 23 N. H. 149; *Loring v. Woodward*, 41 Id. 39; *Walton v. Walton*, 7 Johns. Ch. 456; 11 Am.

Dec. 456, and note 468, where the subject of specific legacies is discussed at some length. Peters, J., in delivering the opinion of the court in *Harper v. Bibb*, 47 Ala. 553, said: "A specific legacy is one that can be separated from the body of the estate and pointed out so as to individualize it, and enable it to be delivered to the legatee as a thing *sui generis*." And Comegys, C. J., in pronouncing the judgment of the court in *Cooch's Ex'r v. Cooch's Adm'r*, 5 Houst. 540, 1 Am. St. Rep. 161, said: "A legacy is only specific when it designates a particular thing or things by specific description, as, my bay mare, my gold watch, my shares of stock in such a bank, or the like; or mentions some place where the thing itself can be found, as, my bank notes in a certain drawer; or indicates some part of the personal estate, consisting of various articles which can be easily distinguished and set apart from the residue, as, all my personal property in a certain room, house, hundred, county, etc." In *Loring v. Woodward*, 41 N. H. 391, a legacy in these words was held to be specific: "One half of all my stock in the following-named railroad, to wit, the L. & N. R. R., etc., and one half of my stock in the W. bank." For other examples of specific legacies, see the note to *Walton v. Walton*, 11 Am. Dec. 468, 469. In *Estate of Woodworth*, 31 Cal. 595, it was held that a bequest of "all my personal estate" was not a specific legacy.

A demonstrative legacy is a bequest of a certain sum of money to be paid out of a particular fund pointed out by the testator, or out of the proceeds of particular personal property designated by him: 3 Pomeroy's Eq. Jur., sec. 1133; *Mullins v. Smith*, 1 Drew & S. 204; *Acton v. Acton*, 1 Mer. 178; *Robinson v. Geldard*, 3 Macn. & G. 735; *Paget v. Huish*, 1 Hem. & M. 663; *Maybury v. Grady*, 67 Ala. 147; *Wallace v. Wallace*, 23 N. H. 149; *Pierrepont v. Edwards*, 25 N. Y. 128; *Welch's Appeal*, 28 Pa. St. 363; *Armstrong's Appeal*, 63 Id. 312; *Walton v. Walton*, 11 Am. Dec. 456, note 469.

A general legacy is one that is payable out of the general assets of the estate. It is one that is so given as not to amount to a bequest of some identical article or fund forming part of the testator's estate, or of a sum payable out of such an identified fund: Pomeroy's Eq. Jur., sec. 1132; *Maybury v. Grady*, 67 Ala. 147; *Clayton v. Akin*, 38 Ga. 320; 95 Am. Dec. 393; *Chace v. Lockerman*, 11 Gill & J. 185; 35 Am. Dec. 277; *Malter of Newman*, 4 Demarest, 65. Gifts of money where the amounts only are stated are always general legacies: 3 Pomeroy's Eq. Jur., sec. 1132. A bequest of any chattels, as, a white horse, or furniture, or goods, or of any kind of securities, will be held to be a general legacy, even though the testator owns articles of the same kind, or even owns an article precisely answering to the description, unless the language of the bequest clearly points out the thing given: Pomeroy's Eq. Jur., sec. 1132; *Gilmer v. Gilmer*, 42 Ala. 9; *Harper v. Bibb*, 47 Id. 547; *Brown v. Grimes*, 60 Id. 647; *Randle v. Carter*, 62 Id. 95; *Tift v. Porter*, 8 N. Y. 516; *Giddings v. Seward*, 16 Id. 365; *Newton v. Stanley*, 28 Id. 61; *Bliven v. Seymour*, 88 Id. 469; *Sponsler's Appeal*, 107 Pa. St. 95. A pecuniary legacy given to an executor is a general legacy, although expressed to be "in addition to the usual commissions at law, and as full compensation for any trouble he may have in executing my will": *Clayton v. Akin*, 38 Ga. 320; 95 Am. Dec. 393. And as a general rule, courts are inclined to lean strongly to that construction of a will which makes a legacy general rather than specific: *Tift v. Porter*, 8 N. Y. 516; *Giddings v. Seward*, 16 Id. 365; *Norris v. Thompson*, 16 N. J. Eq. 222. The Civil Code of California thus defines a residuary legacy: "A residuary legacy embraces only that which remains after all the bequests of the will are discharged": Civ. Code Cal., sec. 1357, subd. 4.

The order in which the assets of the estate of a deceased person are to be appropriated in the payment of debts due by him, and of legacies given by him, may be determined by the express provisions of his will. But in the absence of any directions in the will, the law has established an order in which the claims of the various parties entitled are to be satisfied out of the estate left by the testator. The claims of creditors are paramount to those of all others, whether heirs, devisees, or legatees, and must be paid in full out of the assets of the estate subject to their payment. Both the personal and real estate of the decedent are liable to the payment of his debts, and if the property of the estate is not sufficient to pay all the debts of the testator in full, all devises and bequests fail. The personal estate is the primary fund for the payment of both debts and legacies, in the absence of express directions in the will. But the creditors are not confined to the personal estate, but may have their claims satisfied out of the real estate as well. Ordinarily, however, the personal estate is not only the primary fund, but, *prima facie*, the exclusive fund from which pecuniary legacies are to be paid. They are not charges on the real estate unless the testator so directs, either expressly or by implication: *Newsom v. Thornton*, 82 Ala. 402; 60 Am. Rep. 743; *Estate of Woodworth*, 31 Cal. 595; *Cooch's Ex'r v. Cooch's Adm'r*, 5 Houst. 540; 1 Am. St. Rep. 161; *McCampbell v. McCampbell*, 5 Litt. 92; 15 Am. Dec. 48; *White v. Kauffman*, 66 Md. 89; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Reynolds v. Reynolds's Ex'rs*, 16 N. Y. 257; *Bevan v. Cooper*, 72 Id. 317. And the rule that the personal estate must first be exhausted in payment of debts is not changed by the system of settlement of estates making all property, real and personal, responsible for such payment: *Cooch's Ex'r v. Cooch's Adm'r*, 5 Houst. 540; 1 Am. St. Rep. 161; *Hope v. Wilkinson*, 14 Lea, 21; 52 Am. Rep. 149. Bryan, J., in delivering the opinion of the court in *White v. Kauffman*, 66 Md. 92, said: "The personal estate is the natural and primary fund for the payment of debts and legacies; and even when the real estate is expressly charged, no resort can be made to it unless the personalty is exhausted, unless it has been exonerated by the terms of the will. If the testator gives a legacy, the law conclusively presumes that it is to be paid only out of the personalty, and if that is insufficient the legacy is lost, unless a contrary intention is shown on the face of the will. If he wishes it to be paid out of the realty, he must so state, either by express words or by fair and reasonable implication." As a general rule, real estate is not chargeable with the payment of pecuniary legacies, unless the intention of the testator so to charge it is expressly declared, or may be fairly deduced from the language of the will: *Willard on Executors*, 393; *Wright v. Denn*, 10 Wheat. 204; *Power v. Dams*, 3 McArth. 153; *Gilder v. Gilder*, 1 Del. Ch. 331; *Heslop v. Gatton*, 71 Ill. 528; *Knotts v. Bailey*, 54 Miss. 235; 28 Am. Rep. 348; *Van Winkle v. Van Houten*, 3 N. J. Eq. 172; *Johnson v. Poulson*, 32 Id. 390; *Taylor v. Tolen*, 38 Id. 91; *Tracy v. Tracy*, 15 Barb. 503; *Montgomery v. McElroy*, 3 Watts & S. 27; 38 Am. Dec. 771; *Crone's Appeal*, 103 Pa. St. 571; *Evans v. Beaumont*, 16 Lea, 713; *Arnold v. Dean*, 61 Tex. 249; *Thomas v. Rector*, 23 W. Va. 26. And where there was sufficient personal property to pay all legacies left by the will, the fact that the executor has wasted it is no ground for charging the real estate with their payment: *Hebron Society v. Schoen*, 60 How. Pr. 185.

The intention of the testator to charge legacies upon the real estate devised may be implied from the general dispositions of the will. Legacies will be charged upon the real estate when the intention to make them so is clearly to be collected from the terms of the will: *Le Fevre v. Toole*, 84 N. Y. 95. And extraneous circumstances may be considered in aid of the construction of the terms of the will: *Van Winkle v. Van Houten*, 3 N. J. Eq. 172; *Shulters*

v. *Johnson*, 38 Bail. 80; *Kalbfleish v. Kalbfleish*, 67 N. Y. 354; *Hoyt v. Hoyt*, 85 Id. 142. Where a testator by his will, executed the day before his death, gave a legacy of one thousand dollars to his wife, and another of four hundred dollars to one of his sons, and devised the rest of his estate to his four children in equal shares, and his personal estate proved to be insufficient to pay his funeral expenses, it was held that it must be considered that he intended to charge the real estate with the legacies: *McCorn v. McCorn*, 100 N. Y. 511. When the personal estate proves to be grossly inadequate to pay debts and legacies, very slight indications in the will will be laid hold of to raise an implication that the legacies are to be paid out of the real estate: *Manson v. Manson*, 8 Abb. N. C. 123. This implication will not, however, be raised, merely by the use of formal words or the presence of commonly employed phrases: *Matter of City of Rochester*, 110 N. Y. 159. But where it is manifest from the whole will that it was the design of the testator that the legacies should be paid at all events, the implication is, that the residuary devisee or legatee shall only have the remainder after the satisfaction of the previous dispositions: *Knotts v. Bailey*, 54 Miss. 235; 28 Am. Rep. 348; *Thomas v. Rector*, 23 W. Va. 26. And where a testator conveyed his lands to a person, and afterwards bequeathed legacies to persons other than the grantee, and the circumstances showed that the execution of the deed was a part of a testamentary scheme, it was held that a court of equity would compel the grantee to pay the legacies given in the will: *Tigner v. McGehee*, 60 Miss. 185.

Where real estate is devised to an executor or other person, "after the payment of" legacies, or with the legacies "to be first paid," the real estate so devised is chargeable with the payment of the legacies: 2 Jarman on Wills, 5th Am. ed., 595; 3 Pomeroy's Eq. Jur., sec. 1246; *Preston v. Preston*, 2 Jur., N. S., 1040; *Alcock v. Sparhawk*, 2 Vern. 228; *Henwell v. Whitaker*, 3 Russ. 343; *Newsom v. Thornton*, 82 Ala. 402; 60 Am. Rep. 743; *Dunne v. Dunne*, 66 Cal. 157; *Thayer v. Finnegan*, 134 Mass. 62; 45 Am. Rep. 285; *Cram v. Cram*, 63 N. H. 35; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Brown v. Knapp*, 79 N. Y. 136; *Brown v. Brown*, 79 Va. 648. And in such case the devisee accepting the devise becomes personally bound to pay the legacies, although the land devised proves to be less in value than the amount of the legacy: *Brown v. Knapp*, 79 N. Y. 136. But the rule that land devised "after the payment of legacies" is chargeable with the payment of the legacies does not apply to a specific devise in a former clause of the will, to which particular conditions are annexed, although the devisee is also nominated executor: *Newsom v. Thornton*, 82 Ala. 402; 60 Am. Rep. 743. When there are legacies given by the will, and the residue of the estate, blending the real and personal estate into one mass, is given to residuary devisees, the English authorities, and the great weight of American authority, hold that the real estate is chargeable with the payment of the legacies: 3 Pomeroy's Eq. Jur., sec. 1247; *Wheeler v. Howell*, 3 Kay & J. 198; *Kidney v. Coussmaker*, 1 Ves. Jr. 436; *Greville v. Browne*, 7 H. L. Cas. 689; *In re Bellis's Trusts*, L. R. 5 Ch. Div. 504; *Bray v. Stevens*, 12 Id. 162; *Lewis v. Darling*, 16 How. 1; *Adams v. Brackett*, 5 Met. 280; *Wilcox v. Wilcox*, 13 Allen, 252; *Smith v. Fellows*, 131 Mass. 20; *Knotts v. Bailey*, 54 Miss. 235; 28 Am. Rep. 348; *Heatherington v. Lewenberg*, 61 Miss. 372; *Corwine v. Corwine*, 24 N. J. Eq. 579; *Tracy v. Tracy*, 15 Barb. 503; *Shulters v. Johnson*, 38 Id. 80; *Robinson v. McIver*, 63 N. C. 645; *Moore v. Beckwith*, 14 Ohio St. 129; *McLanahan v. Wyant*, 1 Penn. & W. 96; 21 Am. Dec. 363; *McLanahan v. McLanahan*, 1 Pa. St. 112; *Ballic's Appeal*, 14 Id. 541; *Gallagher's Appeal*, 48 Id. 121; *Estate of Monro*, 9 Phila. 309; *Estate of Lynch*, 13 Id. 322; *Lapham v. Clapp*, 10 R. I. 543; *Thomas v. Rector*, 23 W. Va. 26; 2 Perry on Trusts, sec. 570.

RULES OF ABATEMENT. — Specific legacies are the preferred class, and do not abate with the general legacies, but only in case the deficiency of assets is so great as to render a resort to them necessary, when the fund applicable to the payment of general legacies is exhausted. When they do abate, they abate *pro rata* with one another only: 3 Pomeroy's Eq. Jur., sec. 1137; *Titus v. McLanahan*, 2 Del. Ch. 200; *Cooch's Ex'r v. Cooch's Adm'r*, 5 Houst. 540; 1 Am. St. Rep. 161; *Chase v. Lockerman*, 11 Gill & J. 185; 35 Am. Dec. 277; *Gallego's Ex'rs v. Attorney-General*, 3 Leigh, 450; 24 Am. Dec. 660. In Louisiana, a particular legacy is to be discharged in preference to all others out of the funds of the succession; and in default of funds, it is to be paid as long as the estate is administered by executors indifferently out of the personal and real estate: *Duke of Richmond v. Milne's Ex'rs*, 17 La. Ann. 312; *Labitut v. Prewett*, 1 Woods, 144. And a specific legacy and a specific annuity abate together, unless proof of a contrary intention is clear and positive: *Estate of Gray*, 13 Phila. 372. But unless the identical thing bequeathed by the testator is in existence at the time of his death, and then forms a part of his estate, the specific legacy is wholly inoperative. It cannot be replaced by funds taken from money or property constituting the general assets of the estate: 3 Pomeroy's Eq. Jur., sec. 1130; *Titus v. McLanahan*, 2 Del. Ch. 200; *Chase v. Lockerman*, 11 Gill & J. 185; 35 Am. Dec. 277. See note, on ademption of specific legacies, to *Hansbrough's Ex'rs v. Hooe*, 12 Leigh, 316; 37 Am. Dec. 667. And on the right of specific legatees to be subrogated to the rights of creditors, see note to *Trumbo v. Sorrencey*, 3 T. B. Mon. 284; 16 Am. Dec. 105.

Demonstrative legacies possess some of the qualities of both specific and general legacies. If the fund out of which they are made payable is in existence at the time of the testator's death, they are not liable to abate with general legacies, but are entitled to payment just like purely specific legacies. But if the fund is not in existence, they do not fail, but are then payable out of the general assets of the estate, like general legacies: 3 Pomeroy's Eq. Jur., sec. 1133; 2 Redfield on Wills, 462; *Mann v. Copeland*, 2 Madd. 223; *Balliet's Appeal*, 14 Pa. St. 451; *Armstrong's Appeal*, 63 Id. 312; *Matter of Bull*, 5 Demarest, 451. When annuities are demonstrative, they are governed by the same rule. All general legacies are liable to be abated, even to the point of complete obliteration, in order to pay the debts in full, before resort is had to specific legacies, if there is such a deficiency of assets as to require such an appropriation of the funds otherwise applicable to the payment of these legacies. When a complete abatement is not necessary, the general legacies must abate *pro rata*: 3 Pomeroy's Eq. Jur., sec. 1139; *Clayton v. Akin*, 38 Ga. 320; 95 Am. Dec. 393; *Farnum v. Bascom*, 122 Mass. 282; *Safe Deposit and Trust Co. v. Plummer*, 142 Id. 257; *Hall v. Smith*, 61 N. H. 144; *Titus v. Titus*, 26 N. J. Eq. 111; *Shepherd v. Guernsey*, 9 Paige, 357; *Alsop v. Bowers*, 76 N. C. 168; *Appeal of Trustees of the University of Pennsylvania*, 97 Pa. St. 187. In the absence of any statutory provision on the subject, general legacies in favor of a wife, child, or near relative of the testator are not exempt from abatement with other general legacies: *Shepherd v. Guernsey*, 9 Paige, 357; 2 Redfield on Wills, 552; *Blower v. Morret*, 2 Ves. Sen. 420; *Titus v. Titus*, 26 N. J. Eq. 111; *Estate of Barry*, 13 Phila. 310; *Bliven v. Seymour*, 88 N. Y. 469; *Appeal of Trustees of University of Pennsylvania*, 97 Pa. St. 187. A court will, however, lean towards the finding of an intention in favor of a widow, child, or near descendant: *Lewin v. Lewin*, 2 Ves. Sen. 415; *Van Winkle v. Van Houten*, 3 N. J. Eq. 172. And some states have by legislation changed this rule in favor of near

family relatives: Civ. Code Cal., sec. 1361; *Scofield v. Adams*, 12 Hun, 366; 3 Pomeroy's Eq. Jur., sec. 1141.

EXCEPTIONS TO RULE OF ABATEMENT. — A legacy for which the legatee has given a valuable consideration, as where it is given to a creditor in satisfaction of his debt, or to a person for the surrender of some right, does not abate with mere voluntary gifts, but has a preference over them: Roper on Legacies, 431; Williams on Executors, 1365; 2 Redfield on Wills, 551; Schouler on Executors and Administrators, sec. 490, note; *McLean v. Robertson*, 126 Mass. 537; *Estate of Gassman*, 14 Phila. 308; *Estate of Wilson*, 15 Id. 528; *Appeal of Trustees of University of Pennsylvania*, 97 Pa. St. 187; *Brown v. Brown*, 79 Va. 648. But the burden of proving that a general legacy is entitled to a preference in payment is upon him who asserts it. The mere production of a will giving a legacy in these words, "I give and bequeath to Henry Benson Duncan, for his services in assisting me at different times, the sum of "two thousand dollars," executed more than six years before the testatrix's death, does not, without further proof, sustain this burden: *Duncan v. Franklin Township*, 43 N. J. Eq. 143.

A legacy in lieu of dower, accepted by election, is so far based upon a valuable consideration that it has priority over all other legacies, and will not abate with them. The widow in such case is regarded as a purchaser, and stands on the same footing with creditors: Williams on Executors, 1364; Roper on Legacies, 432; 3 Pomeroy's Eq. Jur., sec. 1142; *Steele v. Steele*, 64 Ala. 438; *Lord v. Lord*, 23 Conn. 327; *Security Co. v. Bryant*, 52 Id. 311; 52 Am. Rep. 599; *Warren v. Morris*, 4 Del. Ch. 289; *Clayton v. Akin*, 38 Ga. 320; 95 Am. Dec. 393; *Moore v. Alden*, 80 Me. 301; 6 Am. St. Rep. 203; *Addison v. Addison*, 44 Md. 182; *Towle v. Swasey*, 106 Mass. 100; *Farnum v. Brown*, 122 Id. 282; *Borden v. Jenks*, 140 Id. 562; 54 Am. Rep. 507; *Pollard v. Pollard*, 1 Allen, 490; *Tracy v. Murray*, 44 Mich. 109; *Howard v. Francis*, 30 N. J. Eq. 444; *Duncan v. Franklin Township*, 43 Id. 143; *Sanford v. Sanford*, 4 Hun, 743; *Williamson v. Williamson*, 6 Paige, 298; *Reed v. Reed*, 9 Watts, 263; *Potter v. Brown*, 11 R. I. 232; *Loockock v. Clarkson*, 1 Desaus. Eq. 471; *Stewart v. Carson*, 1 Id. 500; *Brown v. Brown*, 79 Va. 648; *Blower v. Morret*, 2 Ves. Sen. 420; *Burridge v. Brady*, 1 P. Wms. 127; *Heath v. Dendy*, 1 Russ. 543; *Norcott v. Gordon*, 14 Sim. 258; *Davies v. Bush*, 1 Yonge, 341. The ordinary, in delivering the opinion of the court in *Duncan v. Franklin Township*, 43 N. J. Eq. 145, said: "The established rule is, that where general legatees are volunteers, taking of the testator's bounty, and there is nothing in the will to indicate that one shall be paid before another, their legacies must abate proportionately in case of a deficiency of assets; but where a general legacy is sustained by a valuable consideration, such as the relinquishment of a debt or of a claim of dower, and the right to the claim constituting the consideration subsists at the testator's death, the legatee is entitled to the full payment of his legacy in preference to other general legatees who take merely of the testator's bounty."

This rule does not apply, however, where the will directs that the legacies shall abate ratably: *Tickel v. Quinn*, 1 Demarest, 425; *Orton v. Orton*, 3 Abb. App. 415; nor when there is no dowerable estate: *Perrine v. Perrine*, 6 N. J. L. 133; 10 Am. Dec. 392; *Roper v. Roper*, L. R. 3 Ch. D. 714. And a legacy given to a widow in lieu of dower is subject to contribute towards the share of a post-testamentary child: *Warren v. Morris*, 4 Del. Ch. 289. A widow's right of dower is superior to the claims of creditors as well as of those of legatees and devisees, but when she accepts the legacy in lieu of her dower, she places herself on the same footing with the creditors: *Steele v. Steele*, 64 Ala. 438.

LEGACY TO CREDITOR WHO HAS COMPOUNDED. — If a testator by will gives a legacy to creditors who had compounded with him in his lifetime, it is but a legacy, and not to be preferred to other legacies. Such creditors, having compounded and released their debts, are out of the case as creditors, and must then claim only as voluntary legatees: *Coppin v. Coppin*, 2 P. Wms. 291; *Turner v. Martin*, 7 De Gex, S. & M. 429. A bequest of a debt due from the legatee to the testator is subject to the debts of the testator, and the legatee shares in the residuary fund: *Cole v. Covington*, 86 N. C. 295; 41 Am. Rep. 458.

MISCELLANEOUS. — Legacies bequeathed by codicils stand on the same footing as those of the same class bequeathed by the will: *Gallego's Ex'rs v. Attorney-General*, 3 Leigh, 450; 24 Am. Dec. 650. When an annuity springs alone from a will and is given by it, it is simply a legacy: *Heathington v. Lewenberg*, 61 Miss. 372. The same words that will charge debts upon real estate will also charge legacies thereon: *Ogler v. Tayloe*, 49 Md. 158. The expenses of a contest over the validity of a will, instituted by the heirs, as well as the expenses of the administration, including counsel fees, constitute proper charges against the estate, and a legatee whose legacy has been taken for their payment may have the assets marshaled for his indemnity: *Douglass v. Baber*, 15 Lea, 651. And where a testator gave thirteen hundred dollars to his executor, directing the interest thereon to be paid to his brother Thomas for life, and at his death, to pay to the latter's son Thomas five hundred dollars, and divide the remaining eight hundred dollars among the other children of testator's said brother Thomas, and the assets of the estate were insufficient to pay the debts without taking part of the thirteen hundred dollars, it was held that the thirteen hundred dollars and the five hundred dollars should abate ratably. Thomas, however, contended that he was entitled to the five hundred dollars in full, and refused to accept from the executor his proportional amount, and the executor filed a bill for the construction of the will. It was held by the court that the costs and a counsel fee of fifty dollars should be paid out of the thirteen hundred dollars before distribution, and not out of Thomas's share. If, however, the latter had instituted the proceeding after refusal of the tender, a different result as to costs might be reached: *Van Nest's Ex'r v. Van Nest*, 43 N. J. Eq. 126.

WHERE TESTATRIX, AFTER DIRECTING PAYMENT OF HER DEBTS AND FUNERAL EXPENSES, gives a general pecuniary legacy, and then disposes of the residue of her property, real and personal, in one mass, she indicates her intention to charge her real as well as her personal estate with such legacy: *Hutchinson v. Gilbert*, 86 Tenn. 464.

O'HARA v. STATE OF NEW YORK.

[112 NEW YORK, 146.]

CONSTITUTIONAL LAW. — **LEGISLATURE MAY PROVIDE FOR THE PAYMENT FOR MATERIALS FURNISHED AND SERVICES RENDERED FOR THE BENEFIT OF THE STATE,** and at the instance of its officials, though they were not at the time acting within the limits of their authority, notwithstanding the provisions of section 19, article 3, of the constitution of New York, declaring that "the legislature shall neither audit or allow any private claim or account against the state, but may appropriate money to pay such claims as shall have been audited and allowed according to law."

CONSTITUTIONAL LAW. — **THE LEGISLATURE MAY AUTHORIZE THE PAYMENT OF A CLAIM AGAINST THE STATE NOTWITHSTANDING THE LAPSE OF TIME,** if at the time when the claim was incurred the claimant could not have maintained any action against the state thereon, and this is true notwithstanding the provision of article 7, section 14, of the constitution of New York, declaring that "neither the legislature, canal board, canal appraisers, nor any person or persons acting in behalf of the state, shall audit, allow, or pay any claim which, as between citizens of the state, would be barred by lapse of time." As the claim was not, until the passage of the statute authorizing suit to be brought thereon, a claim such as between citizens of the state would be barred by lapse of time, it does not come within this provision of the constitution. A statute of limitation can never commence to run until a cause of action has accrued, although there may before that time be an imperfect obligation existing in favor of the plaintiff.

APPEAL from an award of the board of claims.

Charles F. Tabor, attorney-general, for the appellant.

William B. Ruggles, for the respondent.

RUGER, C. J. This is an appeal by the state from an award made by the board of claims for services rendered and materials furnished at the request of the quarantine officials, by the claimant, in the years 1875 and 1876, in repairing and fitting up vessels and property used in quarantine affairs in the harbor of New York.

There can be no question but that the maintenance of the quarantine station in that harbor is of great public benefit and importance; nor but that the legitimate expenditures therefor are a public necessity, justifying their incurrence and payment by the state. The organization of the quarantine system was created by the state for the benefit of the people; is under its control; its officers are appointed by it, and it has uniformly provided in some form or another for their compensation, and for the procurement of the supplies necessary to its efficient operation, and it was the moral duty of the state to see that its agents properly discharged their obligations to the persons employed by them in the service of the state.

The services and materials in question were rendered and furnished at the request of the state officials, the compensation therefor was honestly earned by the claimant a long time since, and it is a reproach to the state that satisfaction of the claim therefor should have been so long postponed by controversies among state officials as to the department responsible for their payment. The board of claims have found that in the years mentioned, the claimant performed services and furnished

materials in the repair of the quarantine steamers and other property of the state, under the direction of the quarantine officials, of the value and for the amount named by them in the award. The undisputed evidence showed that the claimant, originally supposing the health-officer to be liable for his claim, sued him in a state court, and was defeated upon the ground that that officer had incurred no personal liability by reason of such services, and that the claim therefor was against the state. Thereupon, in 1878, he filed his claim before the board of audit, and after a hearing, it rendered a decision, holding that the state was not liable therefor, but that the health-officer was, and therefore refused to make an award in his favor, and dismissed the claim. Applications were thereafter made on behalf of the claimant to successive legislatures in each year, excepting that of 1880, with unavailing effect. In 1886, however, an act was passed, being the law under which the board of claims based its authority to make the award in question, which is as follows: "The board of claims is hereby authorized to rehear, audit, and determine the claims of A. K. O'Hara & Co., for work and services done and performed by them for the state under the directions of the quarantine officials, and to award to them such sums as upon due proof before said board shall be a reasonable compensation therefor." It is now claimed by the attorney-general for the state that this act violates section 19, article 3, and section 14, article 7, of the constitution, and is therefore unconstitutional and void.

The provisions of the constitution are as follows (article 3, section 19): "The legislature shall neither audit or allow any private claim or account against the state, but may appropriate money to pay such claims as shall have been audited and allowed according to law."

Article 7, section 14: "Neither the legislature, canal board, canal appraisers, nor any person or persons acting in behalf of the state, shall audit, allow, or pay any claim which, as between citizens of the state, would be barred by lapse of time. The limitation of existing claims shall begin to run from the adoption of this section; but this provision shall not be construed to revive claims already barred by existing statutes, nor to repeal any statute fixing the time within which claims shall be presented or allowed, nor shall it extend to any claims duly presented within the time allowed by law, and prosecuted with due diligence from the time of such presentment. But

if the claimant shall be under legal disability, the claim may be presented within two years after such disability is removed."

It was held by us in *Cole v. State of New York*, 102 N. Y. 54, that an act of the legislature recognizing meritorious services rendered to the state without previous authority of law, and authorizing the board of claims to hear claims for compensation therefor, and award such sum as they might think proper and just, was neither an audit or allowance of a claim against the state within the meaning of section 19, article 3, of the constitution. We think our decision in that case disposes of the objection to the act under consideration.

A brief reference to the history of this claim seems to show that it comes within the principle laid down in that case. Under chapter 444 of the laws of 1876, the board of audit was organized, and was authorized to hear all private claims and accounts against the state (except such as are now heard by the canal appraisers), and to determine the justice and amount thereof, and to allow such sums as it shall consider should equitably be paid by the state. The hearing of the claim in question by that board in 1878 was had under this law, and no other tribunal then existed, or was thereafter created by the state, competent to hear and determine such a claim, until 1883, more than six years after the service had been rendered, and that tribunal was authorized to hear only such claims as should arise within two years previous to the time of filing the claim before it. The board of audit had no power to reopen and rehear claims once determined by it, and no appeal lay from its decisions except those provided by chapter 211, laws of 1881, which were confined to awards made subsequent to January 1, 1879, and did not reach the award made upon the claim of the respondents. Its decision upon the claim, therefore, was final and conclusive between the parties, and determined the fact that for the services in question no legal claim then existed against the state on behalf of the claimants. That determination necessarily proceeded upon the ground that the persons upon whose request the services were rendered had no authority to bind the state, and therefore that no legal cause of action existed against it. It was undoubtedly within the province of the legislature originally to have provided for the rendition of these services and the purchase of materials for the use and benefit of the quarantine station, and it is equally clear that it could by subsequent legislation ratify and approve any act performed for

the benefit of the state, which it had original authority to legislate and provide for: *Brown v. Mayor etc.*, 63 N. Y. 240; *People v. Dennison*, 80 Id. 656; *People v. Stephens*, 71 Id. 529.

It cannot be questioned, we think, but that when individuals voluntarily furnish property or render valuable services to the state at the request of state officers for state purposes, but with the expectation of payment for the same, the legislature may ratify the acts of such officers, although previously unauthorized, and create a legal liability on the part of the state to pay for such property and services, enforceable in its tribunals. The act of the legislature in supplying defects or omissions in pre-existing legislation, whereon a liability may be predicated against the state, is clearly not the audit of a claim; neither is it an allowance thereof. The power of auditing and allowing is expressly referred to the tribunal authorized to hear and determine such claims, and they may allow or reject them as in their judgment and discretion seems just. This we understand to be the decision of the Cole case, and we think it is founded on correct principles. As was there said, the exercise of such a power by the legislature does not, in any just or reasonable sense, conflict with the provisions of the constitution, prohibiting it from auditing and allowing private claims or accounts against the state. It has undoubted power to authorize state officers and agents to contract debts, under certain circumstances, against the state, and as we have before said, it can legalize such as have been theretofore illegally contracted by a subsequent exercise of its legitimate legislative power. It may create tribunals to hear and determine cases between the state and individuals, and it may by law enlarge the authority of existing tribunals to hear the same. In all this it neither audits or allows claims or authorizes their payment. It simply provides a tribunal before which the state may be prosecuted, and enacts that a limitation upon the authority of the tribunal shall not apply to certain obligations. Such a limitation is created by, and may therefore be removed by, legislative authority.

It would certainly be strange, and would subject the state to great loss and damage, if in cases of emergency, and when legislative authority could not be previously obtained to authorize the same, that its servants should be powerless to obtain labor and materials necessary to save it from the destruction of its property, and be compelled to lose advances made in reliance upon the justice and honor of the state, and believing

that they would be subsequently reimbursed for expenditures made for its benefit. It cannot, we think, be said that the constitutional provision was intended to disable the state from paying for property or valuable services received by it from individuals, because they were furnished under the stress of an imminent necessity, without previous authority of law. Although such acts constituted no legal claim against the state, and could not be enforced in an action of law, they formed, in justice and right, irresistible claims upon its honor, and are, we think, within the power of the legislature to legalize, and when authorized and approved by legal tribunals, within its power to provide for and pay. We conclude, therefore, that no constitutional objection to the act in question exists, and its enactment was a legitimate exercise of the power of the legislature.

A more serious question arises over the prohibition imposed upon the board of claims against auditing or allowing claims which, as between individuals, would be barred by lapse of time. Would this claim have been so barred, as between citizens of the state, at the time this statute was passed? If it would, then it must come within the prohibition of the constitutional provision.

We are of the opinion that it is not saved therefrom by the proviso exempting existing claims which have been duly presented within the time allowed by law, and prosecuted diligently thereafter. We think that proviso, by its express terms, applied only to claims existing at the time of the adoption of the amendment in 1874, and did not embrace future cases which were covered by the first paragraph of the section. That paragraph stands alone, and states the rule to be applied to all claims subsequently arising. The claim in question, having accrued after the adoption of the amendment, must be determined by the rule of limitation which obtains "between citizens," as specified in the first paragraph. It is not clear precisely what the framers of the amendment intended by this phrase; because there is but little analogy between the position of a state in reference to the prosecution of claims against it and the condition of a citizen, subject at all times and in numerous tribunals to be brought into court and prosecuted for his liabilities. The state can be prosecuted, in a legal sense, only by its own consent, and after it has created a tribunal to hear and decide claims against it.

It would be manifestly unjust to allow an honest claim

against the state to be defeated by its omission to provide a tribunal where it might be prosecuted: *Hanger v. Abbott*, 6 Wall. 532.

In view of this condition, it was held by this court in *Corkings v. State*, 99 N. Y. 491, that presentation to and prosecution of claims before the legislature, in the absence of other tribunals competent to hear them, would be sufficient to save them from the bar presented by the constitutional amendment against existing claims.

We are therefore compelled to consider the naked question whether, as between individuals, this claim would have been barred by lapse of time, according to the general law of the state when the statute was passed. In the consideration of that question, it must be taken as an established fact in the case that, prior to the passage of chapter 472, laws of 1886, no legal claim, enforceable in any court, existed against the state for the demand in question. That question was adjudicated in 1878 by the board of audit in favor of the state.

By the legislation of 1886, the authority of the quarantine officials to contract for the services and materials in question on the part of the state was ratified and approved by the legislature, and the claim for compensation therefor then had for the first time a legal existence against the state. When, then, did a cause of action arise in favor of the claimant against the state? Obviously not until the legislative recognition. The language of the act of 1886, by clear implication, adopts the authority of the quarantine officials to contract for the services and materials in question, and acknowledges the liability of the state therefor, and the claim in question then had its origin.

It is conceded by the appellant that the award of the board of audit was not such an adjudication as would bar the claim presented to the board of claims, and it would seem to follow therefrom that the statute would not commence to run against the latter claim until its legislative recognition. It is undoubtedly true that the statutes of limitation are equally effectual in ordinary cases against equitable and invalid claims as well as valid and legal ones; but we think, in the case of an imperfect claim or obligation which is unenforceable by reason of some vice or defect therein, which may be cured or waived by the debtor, that a right of action thereon arises at the time the claim becomes purged of the vice by the action of the debtor, and not before. The statute of limitation commences to run

only after a cause of action has accrued, and it does not follow that because the statute has run against an imperfect obligation, that the debtor may not create a new obligation, although founded on one which has outlawed. In the case of an individual contracting with a pretended agent, who sues the supposed principal for an alleged breach of contract, and has been defeated upon the ground of want of authority in the agent to make the contract, such an adjudication would not defeat an action brought upon the same contract legalized by a subsequent ratification, even though the liability upon the original contract had in the mean while become outlawed. The imperfect obligation imposed by the original contract would have been perfected by the ratification, and the cause of action, although supported by the moral consideration afforded by the contract, would have been legally completed and made enforceable by the ratification alone. Suppose the quarantine officials had purchased lands in the harbor of New York for quarantine purposes, without authority, and the state had afterwards refused to pay for them, but after the statute had run against such claim, should by legislative action authorize and direct such officials to take possession of such lands and appropriate them to the use of the state; can any one doubt but that a cause of action would then arise against the state for the value of such lands? We think not. It was said by Rapallo, J., in the *Cole* case: "As a general rule, money expended or services rendered by one individual for the benefit of another do not create a legal liability on the part of the person benefited to make compensation. But a law which should provide that in every such case if the party benefited ratifies the acts of the other, and accepts the benefits, he should be liable, would be free from objection, so far, at all events, as it should apply to future transactions. When the legislature is dealing with the imperfect obligation arising from such a state of facts, it seems to us it does not transcend its powers by passing a law affording a remedy even in respect to past transactions, where the state adopts the act and is the party to make the compensation."

The case of *McDougall v. State*, 109 N. Y. 80, is not in conflict with any views herein presented. That claim arose upon a cause of action for damages in tort accruing in 1869. Liability for claims of this character was assumed by the state by chapter 321 of the laws of 1870, and authority given to the canal appraisers to hear and determine them. It was

saved as an existing claim from the operation of the amendment to the constitution in 1874, by the provision exempting claims duly presented and diligently prosecuted. It was held, although it had been duly presented, it had not been diligently prosecuted thereafter, and was, therefore, barred by the statute of limitations. We think the value of the materials furnished by the claimant, in the performance of the services referred to in the act, constituted a part of the claim, and were fairly within the spirit of the provision authorizing the hearing by the board of claims.

We are therefore of the opinion that the award appealed from should be affirmed.

LEGISLATURE MAY AUTHORIZE PAYMENT of a claim created under and by virtue of an unconstitutional law, though it is declared by the constitution to have no power to authorize the payment of any claim created without express authority of law: *Miller v. Dunn*, 72 Cal. 462; 1 Am. St. Rep. 67.

LIABILITY OF PERSONS ACTING UNDER UNCONSTITUTIONAL STATUTE: Note to *Kelly v. Bemis*, 64 Am. Dec. 51-55.

POND v. METROPOLITAN ELEVATED RAILWAY CO.

[112 NEW YORK, 186.]

DAMAGES, MEASURE OF. — IN COMMON-LAW ACTION AGAINST A RAILWAY COMPANY TO RECOVER FOR DAMAGES RESULTING from the shutting off of light from the plaintiff's premises by the maintenance of an elevated railway in front thereof, the plaintiff's recovery must be restricted to the damages sustained prior to the commencement of the action. The fact that they will probably continue permanently cannot be taken into consideration. The plaintiff, in the event of their continuance, must seek redress in subsequent actions.

ACTION for damages caused by the construction and operation of defendant's elevated railway in front of plaintiff's premises, situate on West Third Street, New York City. At the trial, the plaintiff rested his claim for compensation for injury occasioned by the obstruction of light. The court allowed him permanent damages, on the theory that the defendant's road was intended as a permanent structure, and its injury to plaintiff's property would be continuous. The general term affirmed the judgment of the trial court.

Edward S. Rapallo, for the appellants.

Inglis Stuart, for the respondent.

ANDREWS, J. The sole question on this appeal relates to the rule of damages, that is to say, whether, in a common-law action brought by the owner of premises abutting on a street in the city of New York, laid out under the act of 1813, through which the defendant's railway has been constructed, to recover damages resulting therefrom, through the interruption of light which theretofore passed to his premises from the street, the plaintiff can recover complete damages once for all, as for a final and complete destruction *pro tanto* of the easement invaded by the act of the defendant, or is confined to a recovery of such temporary damages as have accrued up to the commencement of the action, as in an ordinary action of trespass upon land, leaving him at liberty to bring a new action in case the obstruction is not discontinued, for subsequent damages, as though a new trespass had been committed. The argument that under the peculiar circumstances, and in view of the nature of the right invaded, as well as the probable permanent character and public purpose of the defendant's structure and franchise, the rule allowing permanent damages to be recovered should prevail, thereby giving finality to the controversy, has been pressed upon us with great force by the counsel for the respondent. But we think the question is not now open to controversy, and that the rule must now be regarded as settled by former decisions, that an abutting owner in a common-law action of this character can recover only such temporary damages as have been sustained up to the time of its commencement, and that he is not entitled to damages measured by the permanent diminution in value of his property, upon the assumption that the wrong is permanent and irremediable.

Story v. New York E. R. R. Co., 90 N. Y. 122, 43 Am. Rep, 146, established the principle that an abutting owner on streets in the city of New York possesses, as incident to such ownership, easements of light, air, and access in and from the adjacent streets, for the benefit of his abutting lands, and that the appurtenant easements and outlying rights constitute private property of which he cannot be deprived without compensation. That was an equity action, and the court, having reached the conclusion that the defendant's structure was an unlawful invasion of the plaintiff's easements, granted an injunction, postponing its actual issuance, however, until after such reasonable time as would enable the defendant to acquire the plaintiff's right by voluntary agreement or compulsory

proceedings. The Story case did not determine any rule of damages. But in *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98, 53 Am. Rep. 123, the general question as to the scope of the remedy in an ordinary legal action for damages sustained by an abutting owner from the construction of a railway in the street fronting his premises, without his consent and in violation of his rights, was elaborately considered, and it was determined that in such an action the plaintiff could recover temporary damages only; that is, such damages as had been sustained up to the commencement of the action, and the judgment below, which allowed damages measured by the permanent depreciation in the value of the plaintiff's lots upon the assumption that the trespass and wrong would be continued, was reversed.

The case of *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 270, was an action like the present one, brought by an abutting owner for damages in which the plaintiff recovered the permanent depreciation in value of his premises by reason of the construction and operation of the defendant's road, on the theory that the appropriation and invasion of the plaintiff's easement was final and complete. This court affirmed the judgment, stating in its opinion that the case was taken out of the operation of the Uline case, *supra*, for the reason that the record disclosed that the parties had agreed upon the rule of damages. The plain inference is, that except for this, the doctrine of the Uline case would have controlled, and the objection to the measure of damages would have prevailed. The case of *New York National Bank v. Metropolitan El. R'y Co.*, 108 N. Y. 660, is a still more explicit recognition by this court of the application of the doctrine of the Uline case to actions like this. That was an equitable action brought by an abutting owner, and was sustained. The plaintiff was awarded judgment for past loss of rentals, and an injunction was granted restraining the further operation and maintenance of the road, unless the defendants paid a certain sum equal to the amount of depreciation in the value of the property, as for a permanent appropriation. There was no ground for maintaining the action for equitable relief upon any circumstances disclosed in the complaint, provided the plaintiff could have recovered permanent and complete damages, as for an actual taking of his easement, in a legal action. We think these cases have settled the rule that permanent depreciation cannot be recovered in an action like this. It is

understood that this has been the interpretation of our decisions upon which the courts below have acted in many cases. It might be productive of less inconvenience, on the whole, if an opposite rule could be adopted. But the rule established is consistent with legal principles. A recovery of judgment for damages for a trespass or the invasion of an easement does not operate to transfer the title of the property to the defendant, either before or after satisfaction, nor does it extinguish the easement. By the ordinary rule, it is an indemnity for a past wrong, leaving unaffected the plaintiff's right to his property. When he comes to the court for equitable relief, the court may mold it to suit the circumstances, as was done in *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423. The present case was an action for damages simply. The plaintiff neither in his complaint nor on the trial asked for equitable relief.

We think the judgment should be reversed and a new trial granted.

SUCCESSIVE SUITS FOR ACTUAL DAMAGES, from time to time: *McConnel v. Kibbe*, 33 Ill. 175; 85 Am. Dec. 265.

DAMAGES FOR CONTINUANCE OF NUISANCE: *Ellis v. American Academy of Music*, 120 Pa. St. 608; 6 Am. St. Rep. 739, and note 745.

PHILLIPS v. PHILLIPS.

[112 NEW YORK, 197.]

PRECATORY BEQUESTS. — IF IN A WILL THE TESTATOR GIVES THE WHOLE of his property to his wife, naming her as executrix, and then proceeds as follows: "If she find it always convenient to pay to my sister, C. B., the sum of three hundred dollars a year, and also to give my brother, E. W., during his life, the interest on ten thousand dollars per year, I wish it to be done," — the executrix is not at liberty, as her caprice may suggest, to pay or withhold those sums, but must pay them if her financial circumstances are such as to make it convenient for her so to do.

Louis Marshall, for the appellant.

A. L. Johnson, for the respondent.

FINCH, J. The will to be construed was written by the testator himself, and while extremely brief and simple, presents a problem not altogether easy of solution.

Its terms give to the testator's wife the whole of his property, real and personal, name her as executrix, and then proceed as follows: "If she find it always convenient to pay my

sister, Caroline Buck, the sum of three hundred dollars a year, and also to give my brother, Edwin W., during his life, the interest on ten thousand dollars [or seven hundred dollars per year], I wish it to be done." The widow has paid the annuity to the sister regularly, but that to the brother for a single year only. During the years succeeding, no payment was made, and this action is brought by the executrix for a construction of the will, and to determine whether she is bound to make the payments withheld. It is admitted by formal stipulation that the contingency described in the will has in fact happened during the three years after 1883, and that the financial situation of the widow during the years of her refusal was such that it was entirely convenient for her to have paid the disputed allowance, and that she refused payment, not on that account, but from motives of her own, with which she claims the courts have no concern, and about which they are not at liberty to inquire. The general term has sustained her contention upon an opinion of the trial judge, very patiently and carefully prepared, and from which we depart only upon convictions that we are unable to resist.

The real intention of the testator was one of two things: he meant to make the annuities to his brother and sister dependent upon the existence of a specific fact, or upon the choice and will of his devisee. If they rest upon the former, they become a gift from him; if upon the latter, they have no existence outside of the choice of the widow. The substantial argument in her behalf is, that a devise and bequest of the whole property, sufficient in its terms to carry the absolute ownership, will not be cut down by a later provision, unless that is clear and definite, and manifests such purpose and intention; that the words "I wish it to be done" are not a direction or command, but the mere expression of a desire intended to influence, though not to control, the action of the wife in dealing with what is absolutely hers. The whole strength of this argument lies in the use of the word "wish" by the testator. It is claimed to be not sufficiently imperative or unequivocal to master the discretion involved in the absolute ownership previously given, and to rise only to the level of a request or suggestion. But the word "wish" used by a testator is often equivalent to a command. If in this will he had said, "I wish all my property to go to my wife," and naming her as executrix, had ended his will, neither she nor we would have questioned that the devise was effectual. We

gave that force to the word in a case involving other circumstances which left little room for doubt: *Bliven v. Seymour*, 88 N. Y. 469. It is true that in both the supposed and the decided case no other meaning could be given to the word "wish" than that of "will" or "direct," while here the narrower and less imperative interpretation is possible; but that fact only makes more difficult the duty of determining in which sense the word was employed in the will before us, and of ascertaining the purpose and intent of the testator. He left no children. His duty as it is evident he understood it was first and primarily to his wife, and next to his sister and brother. He left an estate worth one hundred thousand dollars, and knew that his wife possessed in her own right forty thousand dollars more. The primary duty to his wife he met by giving to her all his property; the duty to those of his own blood he performed either by a bequest of the annuities to them charged upon the gift to his wife so long as that charge should prove no inconvenience to her, or by leaving those annuities wholly to her discretion, himself merely seeking to influence but not to control her choice. And so we are to ascertain, if we can, which is the truth, or that there is such doubt as to make the general devise conclusive.

One suggestion made on behalf of the appellants is, that the framing of the condition or contingency shows that the provision for the brother and sister was not meant to be dependent upon the absolute and uncontrolled choice of the wife. If that had been testator's purpose, the condition interposed was both needless and misleading. Without it she would be left to give the allowance or not as she pleased, and could suffer no inconvenience at the hands of the testator. But with it the inference is that the contingency provided for was the only one intended to excuse payment. That contingency was an actual fact to happen or not to happen along the line of the future, and independent of the mere volition or choice of the general devisee. "If she find it always convenient," are the words. "If she *find* it"; that is, if experience shows it; if the facts at the time of payment prove to be such; if her financial condition as it shall then exist enables her to pay easily. The expression contemplates, not her choice or preference, but her pecuniary situation after the experience or management of one or more years, and it indicates his purpose to have been to charge the annuities upon the sweeping gift to his wife, provided, and provided only, that in

her experience of the future it should turn out that the payment of those charges would occasion her no inconvenience.

"If she find it *always* convenient"; that is, on each occasion, at the date of every payment. The use of the word "always" implies a conviction in the testator's thought, which would quite naturally exist, that in view of the large estate he had given his wife, and her own ample fortune, it would usually and ordinarily, when the time of payment came, prove to be easy and convenient for her to spare the money for that purpose, but that such a state of facts might not always and upon every occasion exist; that in her management of the property there might come misfortune, reducing or destroying income, or some exceptional increase of expenses due to an under-estimate of incurred expenditure; and if that happened at any one or more of the times of payment, he desired that not she, but his sister and brother, should bear the consequent inconvenience. In these words of the testator, his purpose and intention, I think, is sufficiently disclosed. He did not mean to make the payment of the annuities dependent upon the mere choice or will of his wife, but upon her ability to pay them without inconvenience to herself. Given that ability, he says: "I wish it to be done." The words are not, I wish her to do it, or I hope she will feel it to be her duty, or I trust she will see the propriety of such payment to be made; but I, the testator, dealing with my own bounty to her, "I wish it to be done"; it is my wish, not hers, that I put behind the annuities. It is observable, also, that in the gift to his wife he does not add words that could seem inconsistent with a subsequent charge upon it, as for her own use and benefit, or to her and her heirs forever, but leaves the path to a trust or a charge unobstructed so far as possible.

It is perfectly well settled that what are denominated precatory words, expressive of a wish or desire, may in given instances create a trust or impose a charge. Without a detailed consideration of the cases, it is quite clear that as a general rule they turn upon one important and vital inquiry, and that is, whether the alleged bequest is so definite as to amount and subject-matter as to be capable of execution by the court, or whether it so depends upon the discretion of the general devisee as to be incapable of execution without superseding that discretion. In the latter case there can neither be a trust or a charge, while in the former there may be, and will be, if such appears to have been the testamentary intention. The dis-

tion is clearly drawn, and was acted upon in *Lawrence v. Cooke*, 104 N. Y. 632. The word there used was "enjoin," in itself a more imperative word than "wish," and yet a trust or charge was denied, because by the terms of the command the payment to the granddaughter was placed wholly within the discretion of the residuary devisee, and could not be touched by the court without its utter destruction. The provision to be made was at such times, in such manner, and in such amounts as the devisee should judge to be expedient, and controlled only by what her own sense of justice and Christian duty should dictate. It was added, that if she had been enjoined to make suitable provision out of the residuary estate, a charge would have been created, for what would be "suitable" could be determined as a fact, and would be independent and outside of the mere choice or whim of the devisee. If the word had been "wish" instead of "enjoin," the result could not have been different upon either branch of the conclusion. The doctrine is clearly and strongly stated in *Warner v. Bates*, 98 Mass. 277; and had an early illustration in *Manlin v. Keighley*, 2 Ves. 532. I have examined the cases in our own court prior to *Lawrence v. Cooke*, *supra*, and have found in none of them a departure from the doctrine there asserted, or a judgment in hostility to it. The primary question in every case is the intention of the testator, and whether in the use of precatory words he meant merely to advise or influence the discretion of the devisee, or himself to control or direct the disposition intended. In such a case we must look at the whole will, so far as it bears upon the inquiry, and the use of the words "I wish" or "I desire" is by no means conclusive. They serve to raise the question, but not necessarily to decide it. We are convinced that in the present case the testator meant to charge upon the gift to the wife the annuities to his sister and brother, provided only that their payment should not occasion her inconvenience. The legacy to the brother should be computed at seven hundred dollars per year.

The judgment should be reversed, and judgment rendered for the defendant, construing the will in accordance with this opinion, with costs.

PRECATORY TRUST, no particular form of expression is required to create: *Noe v. Kern*, 93 Mo. 367; 3 Am. St. Rep. 544, and cases collected in note 548. This subject is also discussed in exhaustive notes to *Harrison v. Harrison*, 44 Am. Dec. 372-379, and to *Knox v. Knox*, 48 Am. Rep. 494-499.

JOHNSON v. WALLIS.

[112 NEW YORK, 230.]

FOREIGN EXECUTORS MAY SUE OR BE SUED upon contracts made with them in their capacity of executors, though the rule is otherwise with respect to contracts made by the testator in his lifetime. Such executors may be compelled to specifically perform a contract made by them in this state to sell and assign a judgment recovered by their testator.

ACTION for specific performance against the defendants, as executors of Alexander H. Wallis. Judgment for plaintiff at the special term was affirmed by the general term, on appeal.

William G. Wilson, for appellants.

Frank C. Lown, for respondent.

FINCH, J. This is an action in equity to compel the specific performance by the vendors of a contract to sell and assign a judgment recovered by John McAnerney and others, in the the supreme court of this state, against a corporation known as the Hudson River Iron Company. The judgment was assigned to one Alexander H. Wallis, who was a resident of New Jersey, and died leaving a last will and testament, which has been duly proved in that state, and by which the defendants were appointed executors. They have qualified, and entered upon the performance of their trust. They thereafter made a written contract with one Jacob Russell, all whose rights have passed to the present plaintiff, to sell and assign to him such judgment for a price to be fixed as follows: The judgment was a lien, or supposed to be a lien, upon certain lands under the waters of the Hudson River, near Poughkeepsie, in this state, and had no value beyond such lien. Arbitrators were chosen to fix the value of one acre of upland, and that value, multiplied by the number of acres subject to the lien, was to be the purchase price of the judgment. That value was ascertained, the price tendered, and a deed duly demanded, which was refused, and thereupon this action was brought. The plaintiff had judgment which the general term affirmed, and the defendants appealed to this court.

They rely mainly upon the proposition, that as foreign executors they could not sue or be sued in this state, and acquire all their rights from and owe their responsibilities to another jurisdiction. That is the general rule, but in this state at least is confined to claims and liabilities resting wholly upon the representative character. In *Lawrence v. Lawrence*, 3 Barb. Ch.

74, the rule was declared to be applicable only to suits brought upon debts due to the testator in his lifetime or based upon some transaction with him, and does not prevent a foreign executor from suing in our courts upon a contract made with him as such executor. Of course where he can sue upon such a contract he may be sued upon it. The remedy must run to each party or neither. In the present case the action is not founded upon any transaction with the deceased, but upon a contract which the defendants themselves made. By force of the will and their appointment they became owners of the judgment. Their title, although acquired under the foreign law, was good. In *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298, the foreign executor sold an obligation of the estate, and his assignee sued upon it. The action was sustained on the ground that the title of the foreign executor was good and he could transfer it, and while he could not have sued upon it, his assignee was not prevented. In this case, therefore, the defendants were owners of the judgment, and could lawfully contract for its sale. Having done so, they were liable upon that contract, which could be enforced against them because they made it, and it did not derive its existence from any act or dealing of their testator. We agree, therefore, with the courts below that the action could be maintained.

Objection is made that the arbitrators valued the land under water, and not the upland. The arbitrators certify that they valued the land per acre lying between the railroad and the river. That was upland, and not land under water. While they describe it as eleven and eighth tenths acres, that may be rejected as an immaterial element of the description, and does not establish that their valuation extended to anything but the upland. Taking their whole report together, its fair meaning is that they valued one acre of upland at \$25, and so the value of the eleven and eight tenths was \$295.

The judgment should be affirmed, with costs.

ACTION BY AND AGAINST FOREIGN EXECUTOR or administrator: *Derringer v. Derringer*, 5 Houst. 416; 1 Am. St. Rep. 150, and cases collected in note 160; *Petersen v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298, and note 309.

SUIT BY FOREIGN EXECUTOR OR ADMINISTRATOR in courts of Mississippi, under the code of that state: See *Sims v. Hodges*, 65 Miss. 211; *Jackson v. Scanland*, 65 Miss. 481.

REPUBLIC OF HONDURAS v. SOTO.

[112 NEW YORK, 810.]

A NATION OR STATE IS A BODY POLITIC, CONSTITUTING a legal entity, and capable of acquiring and enjoying property, and protecting itself from injury thereto in the courts of foreign countries.

SECURITY FOR COSTS MAY BE EXACTED FROM A FOREIGN INDEPENDENT GOVERNMENT suing in the courts of this state. Such government is a person within the meaning of the statute authorizing the court to require security for costs, when the plaintiff is a person residing without the state.

FURTHER SECURITY FOR COSTS CANNOT BE EXACTED under section 3272 of the code of New York, when a deposit of money has already been made in lieu of an undertaking as security for costs.

In this case the special term made an order requiring plaintiff to make an additional deposit, or file an undertaking as further security for defendant's costs. This order was, upon an appeal to the general term, reversed. From this latter order the defendant appeals.

Simon W. Rosendale, for the appellant.

Emmet R. Olcott, for the respondent.

RUGER, C. J. Section 3268 of the Code of Civil Procedure provides that a defendant, in an action brought in a court of record, may require security for costs in cases, among others, where the plaintiff was, when the action was commenced, either "a person residing without the state"; or "a foreign corporation." The plaintiff claims to be a foreign independent state.

It is urged by the plaintiff that it is neither a person nor a foreign corporation, within the meaning of the code. It is not disputed but that the plaintiff is an independent government, recognized as such by the United States, and capable of entering into contracts and acquiring property, as well as competent, through the rule of comity, of bringing and maintaining actions in the courts of this country; but it is claimed that it does not come within the description of legal entities authorized to require security for costs. That it is within the spirit of the enactment, we think, cannot be disputed, and we are also of the opinion that it is within the letter as well.

Vattel defines "nations or states to be bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint effort of their combined strength. Such a society has her affairs and her inter-

ests. She deliberates and takes resolutions in common, thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights": Law of Nations, 1; Wheaton's International Law, c. 2, secs. 1, 2; Bouvier's Institutes, tit. Nations.

That such a being constitutes a legal entity, capable of acquiring and enjoying property, and protecting itself from injuries thereto in the courts of foreign countries, has long been recognized and established in the tribunals of civilized nations: *Republic of Mexico v. D'Arangoiz*, 5 Duer, 636; *Hullet v. King of Spain*, 1 Dow. & C. 169; *Cherokee Nation v. Georgia*, 5 Pet. 52.

There can be no doubt but that under title 2, chapter 10, part 3, of the Revised Statutes, providing for security for costs in an action brought by any plaintiff not residing within the jurisdiction of the court, that foreign states and nations were required to give such security, and we do not think that the provisions of the code were intended to change the law in that respect.

Section 3268 of the code is stated to be a re-enactment of the previous statute, and it cannot, we think, have been intended thereby to take away the right which resident defendants had to require security for costs. No reason is seen for such a change, and we do not think any was intended to be made. The word "person" was, we think, used in its enlarged sense, as comprising all legal entities except foreign corporations, which were authorized to bring actions in this state. In that sense it embraces moral persons having legal rights, capable of entering into contracts and incurring obligations, as well as natural persons. The statute must be construed with reference to the objects it had in view, the evils intended to be remedied, and the benefits expected to be derived from it; and, as thus construed, we can see no reason why the plaintiff is not included within the description of persons intended to be subjected to its obligations.

A more difficult question, however, arises over the power of the court to acquire additional security where a deposit of money has once been made, under an order as security for costs. The right to require such security is purely a creation of the statute, and authority therefor must be found in the statute, or it does not exist. Under the provisions of the Revised Statutes, hereinbefore referred to, no authority was conferred upon the court to require or permit a deposit of money,

but the security authorized to be required was a bond in a penalty of not less than \$250, and no power to increase the amount of the original security was given. But by chapter 305, Laws of 1875, the Revised Statutes were so amended as to provide that in case the bond given should be insufficient, or the sureties thereon should die, or become insolvent, the court might order an additional bond to be executed and filed by the plaintiff as security for costs already accrued, and those expected to be thereafter incurred. Section 3272 of the code for the first time authorized a deposit of money in place of a bond. That section provides that when a case is made for security, the court must make an order requiring the plaintiff to deposit in court the sum of \$250, as security for costs, or, at his election, to give an undertaking and obtain an allowance of the same by the judge granting the order. Sections 3273, 3274, and 3275 provide the requisites of the undertaking, the mode of exception to sureties, their justification, and the method of allowance of the bond by the judge or otherwise.

The only statutory authority for the requirement of additional security is contained in section 3276, which, so far as it is material, reads as follows: "At any time after the allowance of an undertaking, given pursuant to such an order, . . . the court, or a judge thereof, upon satisfactory proof by affidavit, that the sum specified in the undertaking is insufficient, or that one or more of the sureties have died or become insolvent, or that his or their circumstances have become so precarious that there is reason to apprehend that the undertaking is insufficient for the security of the defendant, must make an order requiring the plaintiff to give an additional undertaking. The last four sections apply to such an order, and to the undertaking given pursuant thereto."

We are of the opinion that when a deposit of money has once been made, the court have no authority to require an undertaking, and whether the plaintiff shall give an undertaking, in the first instance depends solely upon his election. If he then makes a deposit, the court cannot afterwards require any further security to be given. The statute is explicit and unambiguous, and there is no room or occasion for interpretation: *In re Village of Middletown*, 82 N. Y. 196. To require a plaintiff under this statute to file an undertaking, after he has made a deposit, would be an exercise of the power of legislation, and not a matter of judicial construction.

The grounds upon which additional security may be required

relate solely to the incidents of an undertaking, and not at all to those of a deposit. They are: 1. That the amount of the undertaking is insufficient; 2. That the sureties have died or become insolvent; 3. That their circumstances have become precarious. All of these reasons, except the first, in their nature apply exclusively to undertakings, and the first is, by its language, referable only to an undertaking. By the express language of the section, therefore, the power of the court to require additional security arises only after the allowance of an undertaking, and the authority to require further security is, in imperative terms, confined to an additional undertaking, and cannot be extended to the requirement of a further deposit, without adding material language to the section. There is a manifest distinction between a deposit and an undertaking in respect to the causes which may impair them, and we are not able to say but that those differences controlled the legislature in making the discrimination between them. The last clause in the section does not purport to enlarge the power of the court thereunder, but simply provides that the regulations of the previous four sections, so far as they are applicable, shall be applied to the order and undertaking authorized by section 3276.

The argument that the case is within the spirit of the provisions authorizing additional security is without force, in view of the absence of language providing for it, and also the presence of language which by clear implication excludes it.

It was said in *People v. Woodruff*, 32 N. Y. 364: "It is always competent for the legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain intent and obvious meaning of an act, rather than to speculate upon what might have been the views of the legislature in the emergency which may have arisen. It is wiser and safer to leave to the legislative department to supply a supposed or actual *casus omissus* than attempt to do it by judicial construction."

We are therefore of the opinion that the orders of the general and special terms should be reversed, and the motion denied, with costs in both courts.

COST BOND REQUIRED OF NON-RESIDENTS BEFORE COMMENCING SUIT, if tendered after action brought, even though before the motion to dismiss is interposed, comes too late: *Edgar Gold and Silver Min. Co. v. Taylor*, 10 Col. 110.

LADD v. STEVENSON.

[112 NEW YORK, 325.]

VACATION OF JUDGMENTS—INHERENT POWER OF COURTS TO ORDER, IRRESPECTIVE OF LAPSE OF TIME.—Power of the court to vacate judgments is not restricted by section 724 of the code, authorizing motions to be made for relief against judgments taken against the moving party, through his "mistake, inadvertence, or excusable neglect." Its power does not depend on any statute, but is inherent.

VACATION OF JUDGMENT, WHO MAY MOVE FOR.—ONE WHO PURCHASES PROPERTY AFTER NOTICE OF THE ACTION has been filed, and who is therefore bound by any judgment which may be entered therein, bears such a relation to the action that he may, under the code of New York, claim to be made a party during the pendency of the action, and may also move the court for the vacation of any judgment affecting his rights.

ACTION against Willett, begun in May, 1878, to have a certain agreement given the effect of a mortgage, and foreclosed as such. Notice of the pendency of the action was filed the same day. In January, 1879, Willett answered. In February, 1884, the case was tried, Willett, though represented by attorneys, taking no interest in the trial, and instructing his attorneys to let the case go by default. January 15, 1885, judgment was given for plaintiff as prayed for in his complaint. After May, 1878, and before February, 1884, a suit was brought for the partition of the same realty, and a notice of the pendency of this suit was filed June 9, 1879. To this action Willett was a party. It resulted in the sale of the property, pursuant to the judgment therein, and the execution of a deed to V. K. Stevenson, the purchaser. He subsequently conveyed, with full covenants, to Samuel Glover, who, with like covenants, conveyed to one Goelet. On March 28, 1885, the administratrix of Stevenson petitioned the court to be made a party to the action and for the vacation of the judgment. On April 4th of the same year, Goelet presented a like petition. The prayer of these petitions was granted. A second trial was had, in which judgment was given for the defendants. Plaintiff thereupon appealed, both from the order setting aside the first judgment, and from the judgment entered after the last trial.

Frederick P. Forster, for the appellant.

E. E. Anderson, for the respondent.

EARL, J. The court had the power, in the exercise of its discretion, to set aside the judgment entered in favor of the

plaintiff after the first trial, and to permit the three defendants, Stevenson and the Goelets, to appear and answer. Mrs. Stevenson, as the administratrix of her husband's estate, was interested to the full amount of plaintiff's claim, for in case he could enforce his judgment against the real estate, she, as administratrix, was liable to the Goelets upon the covenants contained in her husband's deed and the bond of indemnity given by him to the Goelets; and the Goelets were interested in the real estate in consequence of their purchase of the same, and their ownership thereof. Therefore, under section 452 of the code, it was proper that they should be made parties defendant. And notwithstanding section 724 of the code, the court had the power to set aside the judgment and allow them to come in and defend: *Dinsmore v. Adams*, 5 Hun, 149; *Alling v. Fahy*, 70 N. Y. 571; *Hatch v. Central Nat. Bank*, 78 Id. 487; *Vanderbilt v. Schreyer*, 81 Id. 646; *O'Neil v. Hoover*, 17 Week. Dig. 354.

In consequence of the filing of the notice of the pendency of this action, the first judgment bound these defendants as if they were parties to the action. Persons thus situated bear such a relation to the action that they could not only claim to be made parties during the pendency of the action, but they can also move the court, and be heard in reference to any judgment rendered therein affecting their rights. The whole power of the court to relieve from judgments taken through "mistake, inadvertence, surprise, or excusable neglect," is not limited by section 724; but in the exercise of its control over its judgments, it may open them upon the application of anyone for sufficient reason, in the furtherance of justice. Its power to do so does not depend upon any statute, but is inherent, and it would be quite unfortunate if it did not possess it to the fullest extent.

The present judgment is right upon the merits. The plaintiff had no written stipulation giving or agreeing to give him a lien upon real estate. If he had any agreement for a lien upon this real estate, it all rested in parol, and there was no part performance, and no ground whatever authorizing the maintenance of the action.

The order and judgment appealed from should therefore be affirmed, with costs.

POWER OF SETTING ASIDE JUDGMENTS on motion is a common-law power of courts of record: *Kemp v. Cook*, 18 Md. 130; 79 Am. Dec. 681. Courts of

general jurisdiction have the authority to change, correct, revise, and vacate their own judgments at any time during the term at which they were rendered, and before rights have become vested thereunder: *Harris v. State*, 24 Neb. 803.

TOOLE v. TOOLE.

[112 NEW YORK, 333.]

PURCHASER AT JUDICIAL SALE SHOULD NOT BE COMPELLED TO ACCEPT DOUBTFUL TITLE. Purchaser at partition sale should be released from his bid, if it appears that there were persons, not parties to the suit, who were interested in the property, unless incapacitated to take by reason of alienage. They should have been made parties to the proceeding for partition, and the question of alienage there tried.

PURCHASER AT JUDICIAL SALE SHOULD BE RELEASED FROM HIS BID, if the title appears to be doubtful at the time when he becomes entitled to a deed. It is error for the court in such a case, instead of releasing the purchaser, to continue the cause for the purpose of taking testimony respecting the claims of absent parties. His contract should not be converted into one holding him to performance indefinitely, or until such time as the title can be perfected.

SUIT for partition. The property was sold to D. M. Koehler. He moved the special term to release him from his bid, on the ground that certain named persons, who were not parties to the suit, appeared to hold interests in the property as the heirs at law of Mary Ann Hanley. These persons were non-resident aliens. The special term denied the motion. The purchaser then appealed to the general term, which appointed a referee to take proof upon the question of the alienage of the omitted parties, and to report such proof with his opinion to the court. After the referee reported, the sale was confirmed, and the purchaser's motion to be released denied. The purchaser appealed.

Benno Loewy, for the appellant.

Lewis Johnston, for the respondent.

GRAY, J. It is well settled by the decisions that a purchaser at a judicial sale should not be compelled by the courts to accept a doubtful title. Where irregularities or defects exist in the proceedings, which require further or other proceedings in order to cure them, the objection of an intending purchaser, based upon their existence, should not be overruled, and his contract of purchase be directed to be completed. His contract called for a good title, and if it was bad or doubtful, he should, on his application, be relieved from completing

the purchase. In these partition proceedings the absence of parties was shown, who were of the same blood and kinship with the heirs at law of Mary Hanley, deceased, whose estate was the subject of partition. If they were incapacitated by reason of alienage from having an interest in the property to be partitioned or sold, that was a fact possible of being conclusively established by bringing them into the proceeding and trying out the question of their alienage by due process of law. A judgment obtained as the result of such an action would set at rest forever any existing or possible claims. The proceeding is one *in rem*, the subject being the partition of the real estate, or the distribution of the proceeds of the sale.

The general term concede, in their opinion, that the purchaser at the judicial sale in question was not offered a title free from doubt, and that concession seems fatal to their order, by which he is directed to complete his purchase. We agree with that court, that the proof in the record of the partition proceedings, which discloses the existence of other persons not made parties to the action, who might have an interest, did not sufficiently or conclusively, as against them, establish the incapacity of those persons, as aliens, to have or acquire such an interest.

The court should have granted the application of the appellant to be relieved from his contract, instead of ordering a further continuance of the proceedings in the action by a reference to take proof as to the capacity or incapacity of the absent parties to take and hold the real estate by reason of their alleged alienage. The burden of establishing the fact of alienage and of incapacity was upon the plaintiff in partition, and not upon the purchaser. He had the right to assume that the decree, and sale thereunder, conferred not merely a good legal title, but a title not open to further question or reasonable dispute by other persons, who stood in the same degree of kinship to the deceased. By the terms of his contract, he was entitled to a deed on a day fixed, and he was then ready to perform. That he was right in his objection to the title at that time, the general term acknowledged, and that being the case, they should not have changed his contract, and hold him to be bound to performance indefinitely, or pending further proceedings to perfect title. The sale was in June, 1887, and the deed should have been delivered in July. In January following, the general term ordered the further continuance of the

proceedings before a referee, and then, in the following May or June, after a delay of nearly a year, ordered the purchaser to complete his purchase. There is an absence of any proof as to any damage occasioned by the delay, and it is unnecessary, if not improper, to indulge in presumptions as to the existence of any. We rest our decision upon the ground that, for reasons we have given, the title offered was not one free from doubt, and was fairly open to the objection made.

The orders of the general and special terms should be reversed, and Koehler, this appellant, be relieved from his purchase and repaid his deposit upon the sale, with interest thereon from July 3, 1887, and all his proper and reasonable expenses in examining the title, with costs herein at special and general terms and in this court.

CAVEAT EMPTOR IS THE RULE APPLIED to judicial sales: *Burns v. Hamilton*, 70 Am. Dec. 572 et seq., note. But this rule may be overcome by evidence of fraud, or that the purchaser did not know the condition of the thing purchased, and was induced to buy through misrepresentations of those who, from their peculiar relations to the subject, were supposed to be thoroughly acquainted with it: *Webster v. Haworth*, 8 Cal. 21; 68 Am. Dec. 287; *Roberts v. Hughes*, 81 Ill. 130; 25 Am. Rep. 270; *City of Charleston v. Blohme*, 15 S. C. 124; 40 Am. Rep. 690. In fact the rule is applicable to execution rather than to judicial sales: See Freeman on Executions, secs. 304 i, 304 j, 304 k.

BONA FIDE PURCHASER AT JUDICIAL SALE, how far protected: *Ayres v. Duprey*, 27 Tex. 593; 86 Am. Dec. 651, and note 668; *Carden v. Lane*, 48 Ark. 216; 3 Am. St. Rep. 228.

HUNTER v. COOPERSTOWN AND SUSQUEHANNA VALLEY RAILROAD COMPANY.

[112 NEW YORK, 371.]

NEGLIGENCE IN ATTEMPTING TO BOARD A MOVING TRAIN. — One who, in the full possession of his faculties, and with nothing to disturb his judgment, attempts to board a train then moving at from four to six miles an hour, will be adjudged, as a matter of law, guilty of such want of ordinary care as will preclude a recovery for injuries by him sustained, although the conductor of the train told him "to jump on if he was going."

ACTION to recover damages for causing the death of plaintiff's intestate, under the circumstances stated in the opinion. Judgment for plaintiff.

E. M. Harris, for the appellant.

James A. Lynes, for the respondents.

PECKHAM, J. Accepting the facts as testified to on the part of the plaintiffs in this action, it appears that on the twenty-fifth day of September, 1884, the plaintiff's decedent came to the station of the defendant, called Phoenix Mills, in the early morning, for the purpose of taking a train to the neighboring village of Oneonta. There was a platform in front of the station, the southern end of which was used for freight, and was two or three feet higher than the northern end, which was used more especially for passengers. The passenger portion of the platform was only about one foot above the ground, and communication between the upper and lower platforms was had by steps leading from one to the other. The top of the freight platform was four and one half feet higher than the rails of the defendant's road. At the north end of the freight platform, the distance between it and a car as it would pass along the track would be six inches. At the center of the freight platform it would be four inches, and the same distance at the south end. The plaintiffs' decedent, upon hearing the whistle of a train approaching from the north on its way towards Oneonta, got up and stood on the passenger portion of the platform awaiting its arrival, and when it came within a short distance of the station, the conductor stepped out on the platform of the rear passenger-car, and asked plaintiffs' decedent if he was going, and added, "if you are, jump on." There were but two witnesses sworn on the part of the plaintiffs in regard to the rate at which the train was moving when this direction was given by the conductor. One of them says the train was moving at that time six or eight miles an hour. The other, who was the engineer of the train, stated that it was going from four to six miles an hour. When the conductor directed the deceased to jump on, he was standing on the passenger platform, three or four feet north of the steps connecting with the freight platform, and he started to jump on the front platform of the passenger-car while it was thus in motion. He was caught in some shape, as the witnesses say, without being able to describe exactly how, and rolled along the station platform with his head and shoulders above it. His body was caught about the hips. The train was stopped, and he was taken out, and died within a short time.

From this evidence, it is quite plain that the train was in comparatively rapid motion at the time when the deceased made his attempt to board it. I say comparatively rapid motion, meaning by that a motion **that was rapid when tak-**

ing into consideration that a man was attempting to board a train thus moving. There can be no doubt that the train was moving at least from four to six miles an hour. The engineer thus fixes it, and being a witness for the plaintiffs, and not in the defendant's employ at the time he was sworn, it may be assumed that he did not put the speed any greater than in fact it was.

The deceased was a man in the full vigor of life, presumably of ordinary judgment, at least up to the average of mankind, and he was at a familiar station, and about to take a train to go to a neighboring village a few miles distant. It was the duty of the railroad company (having advertised so to do) to stop its trains at the station in question, and to give ample time to all persons desirous of getting on or leaving trains at that station to do so.

The important question which arises is, Does a man who is *sui juris*, and in the full possession of his faculties, with nothing to disturb his judgment, act with ordinary care in endeavoring to board a train moving at the rate of from four to six miles an hour? It seems to me there can be but one answer to such a question. That it is a dangerous, a most hazardous attempt, must be the common judgment of all men. Persons are taught, from their earliest youth, the great danger attending upon an attempt to board or leave a train while it is in motion, and no person of mature years and judgment but has the knowledge that such an attempt is dangerous in the highest degree.

It is substantially admitted in this case that it would have been negligence on the part of the deceased to have made the attempt, had it not been for the request, or what is termed the direction, of the conductor, to him to get on. It may be assumed that this direction implied a notice to the deceased that the train would not stop at that station, and that unless he attempted to get on while the car was thus in motion, he would be left at the station and compelled to take another and a later train. It may be assumed that, in giving this direction and failing to stop the train, the company was chargeable with negligence, and yet it counts for nothing as a justification or excuse for the conduct of the deceased in attempting to board a train under such circumstances.

There may, undoubtedly, be cases in which an attempt to get on or off a moving train would not be regarded as negligence, as matter of law, and where the question of negligence

upon all the facts of the case should be submitted to the jury. One such case was that of *Filer v. New York Central R. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327. There the plaintiff received the injuries complained of in attempting to get off the cars while they were in motion, making very slow progress. The plaintiff, who was a woman, was directed by the brakeman on the car to get off, and there was evidence upon which the jury might have found that she was told by him that they would not stop or move more slowly to enable her to do so. The name of the station had been called, and the speed of the train had been greatly reduced, so much so, that baggage had been taken from the baggage-car and removed by the porter, and one man, who was supposed to be a little lame, had gotten off safely. Allen, J., in delivering the opinion of this court, said: "She was put to her choice, without any fault of hers, whether to obey the advice and suggestion of the defendant's servant, and follow the example of the man who had preceded her, or to remain on the cars and be carried beyond the place of her destination, and away from her friends; and it was a proper question for the jury, whether this was or was not, under the circumstances, an act of ordinary care and prudence." The learned judge, continuing, said: "Had the cars been going at a rapid rate, the plaintiff must have known that she would be injured in leaping from them, and the attempt to leave the cars, under such circumstances, even at the instance of a railway servant, would have been a wanton and reckless act, and no recovery could be had against the defendant."

In *Morrison v. Erie R'y Co.*, 56 N. Y. 302, it was held that the question whether a person has been guilty of contributory negligence in attempting to alight from a car while it is in motion is not in every case a question of fact for a jury; that when the facts are undisputed, the question of contributory negligence may become one of law. In that case, the plaintiff, suing by guardian, was about twelve years of age, and the train when it approached the station slowed up. It had passed the platform, and while still in motion, the plaintiff's father took her under his arm and stepped from the car and fell, and she was injured. Folger, J., delivering the opinion of the court, said: "Can it be said that a person of ordinary prudence and care would have swung himself from a car in motion down to the ground in the dark, laden with the weight of a child twelve years old, having but one hand and one arm

to aid himself with, when there was no other danger to be avoided by meeting this, and no incentive to the act other than the inconvenience of being carried by his place of abode, and with a full apprehension of the danger he was about to run? I think not, and I am of the opinion that it is so clear that the law and the court should have given the answer without calling in the aid of a jury." See also *Phillips v. Rensselaer and Saratoga R. R. Co.*, 49 N. Y. 177; *Solomon v. Manhattan R'y Co.*, 103 Id. 437; 57 Am. Rep. 760.

In the last cited case, Andrews, J., says: "Negligence, no doubt, is usually a question of fact of which the jury must inquire, but the inference of negligence in a given case may be so clear and convincing that the judge may direct a verdict. The conclusion that it is *prima facie* dangerous to alight from a moving train is founded on our general knowledge and common experience; and it is akin to the conclusion now generally accepted, that it is in law a dangerous, and therefore negligent act, unless explained and justified by special circumstances, to attempt to cross a railroad track without looking for approaching trains. In boarding a moving train, there is generally less excuse than in alighting from one. The party attempting it is not often under the same stress of circumstances as frequently happens in the former case. He may be compelled to wait for another train, but this is an inconvenience merely, which does not justify exposing himself to hazard. . . . If men will take hazards, they must bear the consequences of their own rashness, and it is no just reason for visiting the consequences upon another that his negligence co-operated in producing the result." We think that the facts in this case are so overwhelming in their nature that no reasonable judgment can be formed as to the act of the deceased in attempting to jump upon this moving train other than that it was dangerous and reckless, and that the injury resulting therefrom was contributed to by him.

We do not regard it as of the slightest importance, under the circumstances of this case, that the conductor of the train notified the deceased to jump on. That notification certainly cannot be interpreted to mean more than that the train would not stop or go slower than it was then going, and that if the deceased wanted to take it he must jump on at that moment. That does not alter the highly dangerous nature of the act itself. The deceased was in absolute safety at the time the direction was given. It created no emergency which called

for the exercise of immediate judgment in the choice between two dangers. It was a simple question of possible inconvenience of taking a later train, or reaching his destination by some other conveyance, and it afforded not the slightest justification or excuse for attempting to board a train moving at that rate of speed, and when he did it he did it at his own risk.

We think the plaintiff, upon this state of facts, should have been nonsuited.

For these reasons the judgments of the courts below should be reversed, and a new trial granted, costs to abide the event.

FROM THE FOREGOING OPINION JUDGE DANFORTH dissented. With respect to the facts, he disagreed with his brethren. While the witnesses estimated the rate of speed at which they thought the train was moving, they also described its movements, the speed at which it had been previously running before reaching the station, and the distance run before the train finally stopped. The judge regarded it as a question for the jury, under all the testimony, to determine whether the train was moving as rapidly as the witnesses estimated. He also considered the direction of the conductor a very material circumstance, and that it, the age and activity of the deceased, and all the other attendant circumstances, should have been submitted to the jury, and they permitted therefrom to determine whether the deceased had been guilty of such neglect as the defendant could successfully urge in its exoneration. The substance of the dissenting opinion is apparent from the following extracts therefrom: —

“The appellant relies upon the single fact that the train was in motion; that, as appears from the cases referred to, is not enough to exonerate the defendant. Those decisions show that an intending passenger may attempt to board a moving train, and if injured in doing so, may still recover; that is, the act is not negligent of itself. The speed of the train is in all cases to be considered; but this should be done in connection with the conduct of the train servants, and the age and activity of the traveler, before his action upon the occasion in question can be characterized: *Eppendorf v. B. C. & N. R. R.*, 69 N. Y. 195; 25 Am. Rep. 171; *Filer v. N. Y. C. R. R.*, 49 N. Y. 47; 10 Am. Rep. 327; *Burrows v. Erie R. R.*, 63 N. Y. 556; *Hickey v. B. & L. R. R. Co.*, 14 Allen, 429.”

“Observers are competent witnesses; but few are able to say with even tolerable accuracy the rate of speed at which a train at any given moment is moving. In this case, their attention was not directed to it, and the weight of their testimony was to be determined. The court cannot say from it that the train was, as a fact, moving at a given rate. A jury might say the speed was less than four miles an hour, as much less as the circumstances alluded to might indicate to them, and not necessarily faster than one might walk. The deceased was a young man, and, so far as appears, with the active habits of that age. He stood upon the platform of the station mentally prepared to take the train, with every reason to expect that it would stop as usual. It cannot be said, as matter of law, that a man of ordinary prudence would not have yielded to the direction of the conductor; nor can it be said that to him, in view of the circumstances, the train was moving at a palpably dangerous rate. He did not attempt to board the train by reason of his own impatience, but upon the invitation of defendant's servant. It is to be considered

whether this direction of the conductor was not only a practical expression of his belief that the step might be taken in safety, but also as a strong expression of his opinion that the movement of the train was slow, and within the bounds of safety. All these things might properly lead a jury to the reasonable belief that to the decedent the train did appear to be moving slowly, and moreover, that it was, in fact, brought to such a point as only prevented complete inertness or stoppage, — a resource of engineers to avoid the necessity of overcoming the *vis inertia* of a heavy train at rest. At any rate, the defendant ought not to be permitted to assert that the intestate did not exercise what now it seems would have been better judgment in the condition in which he was placed by its acts. That he did not act prudently should not be adjudged as matter of law, nor can a court say to what extent his action was governed by what might reasonably be inferred from that of the conductor."

NEGLIGENCE IN ALIGHTING FROM A MOVING TRAIN: See *Craven v. Central Pacific R. R. Co.*, 72 Cal. 345. Whether it be an act of negligence for a passenger to attempt to alight from a moving train is ordinarily a question of fact, to be determined by the jury from all the circumstances of the case: *Raben v. Central R. R. Co.*, 74 Iowa, 732. And so as to the act of boarding a street-car when in motion: *Stager v. Railway Co.*, 119 Pa. St. 70.

PAUL v. TRAVELERS' INSURANCE COMPANY.

[112 NEW YORK, 472.]

ACCIDENT INSURANCE POLICY, CONSTRUCTION OF. — A policy was issued by which the person insured was indemnified from loss by accident, in a certain sum per week, "against loss of time not exceeding twenty-six consecutive weeks from the happening of such accident and injury as shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business by reason of bodily injuries, . . . through external, violent, and accidental means; or in the event of death, occasioned by bodily injuries received as aforesaid, when resulting within ninety days from the happening thereof, and in such event only will pay the sum of —; provided, always, that this insurance shall not extend to any bodily injury of which there shall be no external and visible sign upon the body of the insured, nor to any death or disability which may have been caused by hernia, bodily infirmities, nor by the taking of poison, contact with poisonous substances, or inhaling of gas, or by any surgical operation or medical treatment; nor to any cause except where the injury is the approximate and sole cause of the disability or death." The assured was found dead in his room, and it was evident that his death had been caused by breathing illuminating gas, and there were no external or visible signs of injury upon his body. The judge, however, found as a fact that the death was occasioned by accidental means. It was held that this death was one against which the decedent was insured by the terms of the policy above set forth; and that the proviso in the policy, by which the insurer exempted himself from liability for any bodily injury of which there should be no external and visible sign upon the body, clearly had reference only to the weekly claim for indemnity, and not to an injury resulting in the death of the assured.

AN ACCIDENT IS THE HAPPENING OF AN EVENT without the aid or the design of the person injured, and which is unforeseen.

POLICIES OF INSURANCE, CONSTRUCTION OF. — Policies of insurance are to be liberally interpreted, and conditions therein must be construed strictly against those for whose benefit they are reserved. In their construction, their words should be taken in that sense to which the apparent object and intention of the parties limit them, and which is to be gathered from the surrounding clauses, and from all parts of the instrument.

IN INTERPRETING WORDS IN A CONTRACT of which there is an uncertainty, whether they were used in an enlarged or restricted sense, that construction should be adopted which is most beneficial to the covenantee.

INSURANCE POLICIES. — DEATH BY EXTERNAL AND VIOLENT MEANS, within the meaning of an insurance policy, may be occasioned by the breathing of illuminating gas. That gas in the atmosphere as an external cause is a violent agency in the sense that it may work upon the assured so as to cause his death, and his death from such cause must therefore be regarded as an accident proceeding from an external and violent agency.

ACTION upon an accident policy of insurance. Judgment was entered for the defendant in the trial court, but was reversed on appeal to the general term.

Louis Marshall, for the appellant.

William S. Andrews, for the respondent.

GRAY, J. This record contains no other evidence or proofs than are embodied in a paper entitled "statement of facts and stipulation of attorneys," which was submitted by the counsel to the trial judge. Upon this stipulation, the trial judge found, among others, the following as facts: "That on December 3, 1884, and during the continuance of the said certificate or policy of insurance, the said Matthew L. Paul died; that at the time of his death he was stopping as a guest at the Sturtevant House in New York City; that he went to his room in said hotel between ten and eleven o'clock, P. M., of December 2, 1884; that at some time after he went to his room the gas therein became turned on; that about two o'clock of December 3, 1884, the said Paul was found dead in his bed; that the room was tightly closed, and the atmosphere therein was filled with illuminating gas; that the said Paul lay on his bed like a man asleep, without any outward indications that he was dead, and without any external or visible signs of injury upon his body; that the death of said Paul was caused by his breathing the atmosphere of said room, full, as aforesaid, of illuminating gas." And the judge also found as a fact, "that the death of said Paul was occasioned by accidental means." The defendant resists a recovery upon the policy of insurance

on the ground that the deceased came to his death by the inhaling of gas, within the meaning of the policy, and from such a cause of death no right of action arises.

The sole question presented therefore is as to the proper interpretation of the policy of insurance issued to the plaintiff's intestate. By its provisions the person insured is indemnified in a certain sum per week, "against loss of time not exceeding twenty-six consecutive weeks from the happening of such accident and injury as shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business by reason of bodily injuries, . . . through external, violent, and accidental means; or in the event of death, occasioned by bodily injuries received as aforesaid, when resulting within ninety days from the happening thereof, and in such event only, will pay the sum of three thousand dollars; . . . provided, always, that this insurance shall not extend to any bodily injury of which there shall be no external and visible sign upon the body of the insured, . . . nor to any death or disability which may have been caused . . . by hernia, bodily infirmities, . . . nor by the taking of poison, contact with poisonous substances, or inhaling of gas, or by any surgical operation or medical treatment; nor to any case except where the injury is the proximate and sole cause of the disability or death." With great ingenuity and ability the counsel for the litigants have argued in support of their respective positions: the one that Paul's death was the result of an accidental cause, which was covered by the fair and reasonable interpretation of this policy; and the other, that by language clear and unambiguous, which leaves no office for interpretation to perform, such death was expressly excepted in the instrument of insurance.

A careful consideration of this instrument, and of the scope and design of its provisions, leads us to the conclusion that the appellant must fail in its contention. At the foundation lie the facts, conceded and found, that there was a death caused by accidental means, and that the accidental means were the decedent's "breathing the atmosphere of the room full of illuminating gas." The absence of any external and visible sign upon the body of the insured presents no embarrassment. We do not understand the conditions of this agreement to require such a sign as a prerequisite to the right of recovery in case of death. We consider that point of construction to have been covered by the decision of this court in *Mal-*

lory v. Travelers' Ins. Co., 47 N. Y. 52; 7 Am. Rep. 410. In that case the body of the deceased was found in a pond. The policy was one embracing causes only, where the death was caused by an injury received from an accident, and contained this clause: "Provided, always, that no claim shall be made under this policy by the insured in respect of any injury, unless the same shall be caused by some outward and visible means." Grover, J., delivering the opinion of the court, held: "The construction put upon the contract in the charge was correct. That construction was that the terms 'outward and visible means' applied only to injuries not causing death in three months, but to such only as entitled the deceased to certain sums from the company during their continuance, as provided by the policy."

In the present policy, the proviso that the insurance shall not extend to any bodily injury of which there shall be no external and visible sign upon the body of the injured clearly has reference to a claim made under it for the weekly indemnity. Such a provision, obviously, was designed as a proper precaution to guard the company against a liability upon a fraudulent claim by the insured for indemnity for bodily injuries, of which the only evidence might be the word of the person. This policy, like any other contract between parties, is to be construed, not merely by the letter, but by the spirit. We must read it in connection with the whole subject-matter to which it relates, and give to language its ordinary and natural meaning. If, then, the intention of the parties becomes manifest, such intention must prevail. Now, what was the case here of these parties? The deceased desired to secure a pecuniary indemnity against accidents which would disable him from the prosecution of his business, or which would result in his death; and in consideration of what he pays, the company agrees to so indemnify him, but limits its liability to cases of pure accident, happening through external and violent agencies, and not made possible by the exposure of the individual to the action of the elements of weather; to wars or popular tumults; to the dangers of certain occupations mentioned; to the results of engaging in certain sports or adventures, or of his misconduct or unlawful act. It excludes injuries and death resulting from intentional or suicidal acts, or from voluntary and conscious and unnecessary exposure to perils and risks. It excludes injuries resulting from constitutional infirmities and disease in any form, and death or disabilities

which result from medical or surgical treatment; from the taking of poison, and from the contact with poisonous substances. But in expressing its intention not to be liable for death from "inhaling of gas," the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which, *ex vi termini*, would be included the dentist's work, or to a suicidal purpose. Of course the deceased must have, in a certain sense, inhaled gas; but in view of the finding that the death was caused by accidental means, the proper meaning of words compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act necessarily involved in the process of inhaling. An accident is the happening of an event without the aid and the design of the person, and which is unforeseen. The finding itself defines the cause of death as the breathing of the atmosphere of the room full of illuminating gas. To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake, or poisonous substances may be inadvertently touched; but whatever the motive of the insured, his act precedes either fact.

I agree with the counsel of the respondent in his suggestion that if the exception is to cover all cases where death is caused by the presence of gas, there would be no reason for using the word "inhale." If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake. Policies of insurance are to be liberally construed, and, as in all contracts, conditions are to be construed strictly against those for whose benefit they are reserved: *Catlin v. Springfield Ins. Co.*, 1 Sum. 440. In their construction, their words should be taken in that sense to which the apparent object and intention of the parties limit them, and which is to be gathered from the surrounding clauses and from all the parts of the instrument: *Yeaton v. Fry*, 5 Cranch, 335; *White v. Hudson River Ins. Co.*, 15 How. Pr. 288; *Hoffman v. Aetna etc. Co.*, 32 N. Y. 405; 88 Am. Dec. 337. It is an accepted canon of interpretation, that if there is any uncertainty as to whether given words were used in an enlarged or restricted sense, that construction should be adopted which

is most beneficial to the covenantee: *Doe v. Dixon*, 9 East, 15; *Marvin v. Stone*, 2 Cow. 806. To hold that the death of plaintiff's intestate was caused by the inhaling of gas, within the meaning of this policy, would be to construe its terms contrary to the usual import of language, and in fact, to hold, against the finding, that the death was not accidental.

As to the point raised by the appellant, that the death was not caused by external and violent means within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause. The cases collated on the respondent's brief sufficiently establish that as a proposition: *Trew v. R'y etc. Co.*, 7 Jur., N. S., 878; *Reynolds v. Accident etc. Co.*, 22 L. J., N. S., 820; *McGlinchey v. Fidelity & C. Co.*, 80 Me. 251; 6 Am. St. Rep. 190. The case of *Hill v. Hartford etc. Co.*, 22 Hun, 187, cited by appellant, was that of a physician's death from drinking by mistake water from a goblet in which was some poison. It was held, by a divided court, that the injury was not effected through external and violent means, within the meaning of similar provisions of a policy. We cannot approve of the reasoning of the court, and agree with the general term opinion in this case, that the rule there laid down was too strict.

In *McGlinchey v. Fidelity & C. Co.*, 80 Me. 251, 6 Am. St. Rep. 190, the supreme court of Maine held similar views of construction of an accident policy, and rest, among other authorities, upon the general term opinion in this case.

The order of the general term should be affirmed, and judgment absolute should be ordered in favor of the plaintiff, under the defendant's stipulation.

WHAT IS DEATH BY ACCIDENTAL MEANS. — Insurance against injury or death, caused by accidental means, frequently involves the inquiry, What is an "accident" within the meaning of the policy? Worcester defines "accident" to be "an event proceeding from an unknown cause, or happening without the design of the agent": Worcester's Dict., tit. Accident. Webster's definition is: "An event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected": Webster's Dict., tit. Accident. This latter definition has been frequently approved in actions on accident policies: *North American L. & A. Ins. Co. v. Burroughs*, 69 Pa. St. 43, 51; 8 Am. Rep. 212, 216; *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 30; 1 Am. Rep. 157, 158; *Ripley v. Railway Passengers' Ins. Co.*, 2 Bigelow's L. & A. Ins. Reps. 738. Gray, J., in the principal case, says that "an accident is the happening of

an event without the aid and the design of the person, and which is unforeseen"; while in *McGlinchey v. Fidelity and Casualty Co.*, 80 Me. 251, 6 Am. St. Rep. 190, the court say: "The definition of 'accident' generally assented to is an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual, and not expected to the person to whom it happens." In *Barry v. United States Mutual Accident Ass'n*, 23 Fed. Rep. 712, 714, Dyer, D. J., in charging the jury, said: "Was there anything accidental, unforeseen, involuntary, unexpected in the act of jumping, from the time the deceased left the platform until he alighted on the ground? The term 'accident' is here used in its ordinary, popular sense, and in that sense it means 'happening by chance, unexpectedly; taking place not according to the usual course of things,' or not as expected. In other words, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means. But if in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted from the accident, or through accidental means." Finally, Cockburn, C. J., says: "It is difficult to define the term 'accident,' as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident, and injury or death from natural causes, such as shall be of universal application. At the same time, we may safely assume that in the term 'accident,' as so used, some violence, casualty, or *vis major* is necessarily involved. We cannot think that disease, produced by the action of a known cause, can be considered as accidental. Thus disease or death, engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental, unless, at all events, the exposure is itself brought about by circumstances which may give it the character of accident": *Sinclair v. Maritime Passengers' Assur. Co.*, 3 El. & E. 478; 30 L. J. Q. B. 77; 7 Jur., N. S., 367; 4 L. T. 15; 9 Week. Rep. 342.

The foregoing serve to indicate with reasonable certainty the meaning of "accident" or "accidental"; yet it must be remembered that the policy may show by its terms and conditions that the parties have used the word in a special or peculiar sense. It has been held, in accordance with the above, that where a person, insured against "any personal injury from or by reason or in consequence of any accident which should happen to him upon any ocean, sea, river, or lake," while on board his ship was sunstruck, from the effects of which he died, his death could not be said to have arisen from accident, within the meaning of the policy: *Sinclair v. Maritime Passengers' Assur. Co.*, 3 El. & E. 478; 30 L. J. Q. B. 77; 7 Jur., N. S., 367; 4 L. T. 15; 9 Week. Rep. 342. So where a person insured against death or injury, "by violent and accidental means," was injured internally by jumping in great haste from a railroad car at a station, and running a considerable distance, but which action was not necessary to his safety, but was voluntarily undertaken to effect an important object which required haste, it was held that the injury was not by "accidental means": *Southard v. Railway Passengers' Assur. Co.*, 34 Conn. 574; and in an action on a policy which insured against death caused by external, violent, and accidental means, where the death was alleged to have occurred by reason of the rupture of a blood-vessel, sustained while exercising with Indian clubs, the jury were instructed by Dyer, D. J., that if the insured used the clubs in the ordinary way, and without the interference of any unusual circumstance, the injury was not accidental;

but if there occurred any unforeseen, accidental, or involuntary movement of the body, which, in connection with the use of the clubs, brought about the injury, then such means were accidental, and within the terms of the policy: *McCarthy v. Travelers' Ins. Co.*, 8 Biss. 362; and in *Barry v. United States Mutual Accident Ass'n*, 23 Fed. Rep. 712, where the insured came to his death by an injury sustained by voluntarily jumping from a platform to the ground, the same judge charged the jury to the same effect, as follows: "I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred changing or affecting the downward movement of his body, as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated, or would naturally anticipate, then any resulting injury was not effected through any accidental means. But if, in jumping or alighting on the ground, there occurred from any cause any unforeseen or involuntary movement, turn, strain, or wrenching of the body, which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would not be attributed to accidental means."

In some cases, there is little difficulty in holding that death was accidental. Thus where the insured, while traveling by rail, during a stoppage of the train on a bridge, went to the front platform of the coach in which he was riding, and stepped off, and through a hole in the floor of the bridge, causing his death, it was held that his death was caused by an accident: *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205; and where a traveler by railway, while asleep and unconscious, involuntarily arose and walked to the platform of the car, and fell therefrom and was injured, it was held not a case of "voluntary exposure," "design," or "self-inflicted injury," within the meaning of conditions exempting the company from liability: *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13; 46 Am. Rep. 618. Again, where the insured came to his death by the handle of a pitchfork slipping through his hands and striking him in the bowels, or by straining the abdominal muscles, while he was pitching hay, producing peritoneal inflammation, it was also held that death was caused by an "accident," within the meaning of the policy: *North American L. & A. Ins. Co. v. Burroughs*, 69 Pa. St. 43; 8 Am. Rep. 212. So where, while the insured was driving upon a public street, his horse became frightened at an unsightly object, and ran away, without upsetting the carriage, or coming in contact with anything, and was at length brought under control, but the insured was apparently greatly endangered at the time, and suffered so severely, either from fright or strain caused by his physical exertion in restraining the horse, that he died within an hour afterwards, his death was caused "by bodily injuries effected through external, violent, and accidental means": *McGlinchey v. Fidelity and Casualty Co.*, 80 Me. 251; 6 Am. St. Rep. 190; and a similar ruling was made where the insured came to his death by the infliction, without intention on his part, of a putrid animal substance upon a portion of his body, causing a malignant pustule: *Bacon v. United States Mutual Accident Ass'n*, 44 Hun, 599; and the same is true where death occurs by taking poison by mistake: *Hill v. Hartford Accident Ins. Co.*, 22 Id. 187, 189 (overruled in the principal case on another point); *Pollock v. United States Mutual Accident Ass'n*, 102 Pa. St. 230; 48 Am. Rep. 204.

Again, where a person was insured against "personal injury caused by any accident" resulting in death, it was held that if a wound received by the insured, being produced by an accident, did not cause death, but did cause him to fall into the water, where he was drowned, then the death was accidental: *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; and where a person insured against "any personal injury caused by accidental, external, and visible means," the direct effect of which should occasion death, died from drowning in the waters of a brook while in an epileptic fit, the injury from which he died was a risk covered by the policy: *Winspear v. Accident Ins. Co.*, L. R. 6 Q. B. D. 42; 50 L. J. Q. B. 292; 43 L. T. 459; 29 Week. Rep. 116; and see also, on the point that death by drowning is death caused by accident, *Trew v. Railway Passengers' Assur. Co.*, 6 Hurl. & N. 839; 30 L. J. Ex. 317; 7 Jur., N. S., 878; 4 L. T. 833; 9 Week. Rep. 671; *Reynolds v. Accidental Ins. Co.*, 22 L. T. 820; 18 Week. Rep. 1141.

It seems that a person waylaid and killed by robbers dies from "violent and accidental means," within a policy of accident insurance: *Ripley v. Railway Passengers' Ins. Co.*, 2 Bigelow's L. & A. Ins. Reps. 738; affirmed on another point in 16 Wall. 336; but a recovery in such a case may be prevented by a proviso in the policy: *Hutchcraft's Ex'r v. Travelers' Ins. Co.*, Sup. Ct. Ky., decided May, 1888. So, also, a policy of insurance against "bodily injuries, effected through external, accidental, and violent means," occasioning death or complete disability, covers a death by hanging one's self while insane, although the policy provided that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide or self-inflicted injuries": *Accident Ins. Co. v. Crandall*, 120 U. S. 527; but where an accident policy provided that no claim should be made under it where the death of the insured was caused by "intentional injuries inflicted by the insured or any other person," it was held that the court erred in instructing the jury that if the insured was murdered, the means used were "accidental" as to him, and plaintiff would be entitled to recover: *Travelers' Ins. Co. v. McConkey*, 127 Id. 661, 667. It may be remarked in this connection, that where it appears that a violent death was either the result of accidental injuries or of a suicidal act of the deceased, the presumption of law is against the latter: *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; *Travelers' Ins. Co. v. McConkey*, *supra*.

The negligence or carelessness of the insured is no defense to an action on a policy of insurance against accidents: *Providence L. Ins. etc. Co. v. Martin*, 32 Md. 310; *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28; 1 Am. Rep. 157.

ACCIDENT, WHAT IS: See *Wabash etc. R. R. Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193, and cases collected in note 208.

TERMS OF ACCIDENT INSURANCE POLICY SHOULD BE LIBERALLY INTERPRETED in favor of assured. And where the terms of an accident policy require proof that death was caused "by bodily injuries effected through external, violent, and accidental means," recovery may be had, although death was produced by a ruptured blood-vessel about the heart, caused either by fright or resulting from extraordinary mental or physical exertion put forth by the deceased to save himself from injury when in imminent peril brought about by accident: *McGlinchey v. Fidelity and Casualty Co.*, 80 Me. 251; 6 Am. St. Rep. 190, and see note 195.

IN CONSTRUING WRITTEN CONTRACT, EVERY WORD SHOULD, IF POSSIBLE, be given its appropriate and proper force and effect, in such manner that no part of the contract shall be ineffectual: *Chrisman v. State Ins. Co.*, 16 Or. 284.

PRESBYTERIAN CHURCH OF ALBANY v. COOPER.

[112 NEW YORK, 517.]

GRATUITOUS PROMISE CANNOT BE ENFORCED BY ACTION, however worthy the object intended to be promoted.

SUBSCRIPTION WHEREBY THE SUBSCRIBERS AGREE TO PAY A CERTAIN SUM TO THE TRUSTEES OF A CHURCH, TO BE USED TO DISCHARGE A MORTGAGE THEREON, reciting a nominal consideration, which in fact was not paid, is a mere gratuitous promise, not enforceable by action, unless the trustees assume some duty or obligation on their part, other than the duty to apply the money, if paid, to the object contemplated by the subscribers.

REFERENCE under the statute to determine whether any liability arose under a subscription paper in the following words: "We, the undersigned, severally promise and agree to and with the trustees of the First Presbyterian Church in this city of Albany, in consideration of one dollar to each of us in hand paid, and the agreement of each other in this contract contained, to pay on or before three years from the date hereof to said trustees the sum set opposite to our respective names, but on the express condition, and not otherwise, that the sum of forty-five thousand dollars in the aggregate shall be subscribed and paid in for the purpose hereinafter stated; and if within one year from this date said sum shall not be subscribed or paid in for such purpose, then this agreement to be null and of no effect. The purpose of this subscription is to pay off the mortgage debt of forty-five thousand dollars, now a lien on the church edifice of said church, and the subscription or contribution for that purpose must equal that sum in the aggregate to make this agreement binding. Dated May 18, 1884." The referee reported in favor of the plaintiff, and a judgment was entered in conformity to his report. This judgment was reversed on appeal to the general term, and a new trial ordered.

Matthew Hale, for the appellant.

Walter E. Ward, for the respondent.

ANDREWS, J. It is, we think, an insuperable objection to the maintenance of this action, that there was no valid consideration to uphold the subscription of the defendants' intestate. It is, of course, unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He

can refuse to perform, and his legal right to do so cannot be disputed, although his refusal may disappoint reasonable expectations, or may not be justified in the forum of conscience. By the terms of the subscription paper, the subscribers promise and agree to and with the trustees of the First Presbyterian Church of Albany, to pay to said trustees, within three years from its date, the sums severally subscribed by them, for the purpose of paying off "the mortgage debt of forty-five thousand dollars on the church edifice," upon the condition that the whole sum shall be subscribed or paid in within one year. It recites a consideration, viz., "in consideration of one dollar to each of us [subscribers] in hand paid, and the agreement of each other in this contract contained." It was shown that the one dollar recited to have been paid was not in fact paid, and the fact that the promise of each subscriber was made by reason of and in reliance upon similar promises by the others constitutes no consideration as between the corporation for whose benefit the promise was made and the promisors. The recital of a consideration paid does not preclude the promisor from disputing the fact in a case like this, nor does the statement of a particular consideration, which on its face is insufficient to support a promise, give it any validity, although the fact recited may be true.

It has sometimes been supposed that when several persons promise to contribute to a common object desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. This seems to have been the view of the chancellor as expressed in *Stewart v. Hamilton College*, 2 Denio, 417, when it was before the court of errors, and *dicta* of judges will be found to the same effect in other cases: *Trustees etc. v. Stetson*, 5 Pick. 508; *Watkins v. Eames*, 9 Cush. 537. But the doctrine of the chancellor, as we understand, was overruled when the *Hamilton College* case, 1 N. Y. 581, came before this court, as have been also the *dicta* in the Massachusetts cases by the court in that state, in the recent case of *Cottage Street Methodist Episcopal Church v. Kendall*, 121 Mass. 528. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an execu-

tory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises, as between the plaintiff and defendant.

In the disposition of this case, we must, therefore, reject the consideration recited in the subscription paper as ground for supporting the promise of the defendant's intestate, the money consideration, because it had no basis in fact, and the mutual promise between the subscribers, because there is no privity of contract between the plaintiff and the promisors. Some consideration must therefore be found other than that expressly stated in the subscription paper, in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfill the condition upon which the liability of the subscribers depended. There is no doubt that labor and services rendered by one party at the request of another constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustees did, or undertook to do, anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals, interested in promoting the general object in view.

Leaving out of the subscription paper the affirmative statement of the consideration (which, for reasons stated, may be rejected), it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property upon a condition precedent limiting their liability. Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied. It was held in *Hamilton College v. Stewart*, 1 N. Y. 581, that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. It may

be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage, that it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment, in case they accepted the money, would arise out of their duty as trustees. This duty would arise upon the receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money, paid on subscriptions, upon the mortgage debt, did not constitute a consideration for the promise of the defendant's intestate. We are unable to distinguish this case in principle from *Hamilton College v. Stewart*, 1 N. Y. 581. There is nothing that can be urged to sustain this subscription, that could not, with equal force, have been urged to sustain the subscription in that case. In both, the promise was to the trustees of the respective corporations. In each case the defendant had paid part of his subscription and resisted the balance. In both, part of the subscription had been collected and applied by the trustees to the purpose specified. In the *Hamilton College* case (which in that respect is unlike the present one), it appeared that the trustees had incurred expense in employing agents to procure subscriptions to make up the required amount, and it was shown, also, that professors had been employed upon the strength of the fund subscribed. That case has not been overruled, but has been frequently cited with approval in the courts of this and other states. The cases of *Barnes v. Perine*, 12 N. Y. 18, and *Roberts v. Cobb*, 103 Id. 600, are not in conflict with that decision. There is, we suppose, no doubt that a subscription invalid at the time for want of consideration may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited, as we understand them, were supported on this principle. There was, as was held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisor. Judge Allen, in his opinion in *Barnes v. Perine*, *supra*, said: "The

request and promise were, to every legal effect, simultaneous"; and he expressly disclaims any intention to interfere with the decision in the Hamilton College case. In the present case it was shown that individual trustees were active in procuring subscriptions. But, as has been said, they acted as individuals, and not in their official capacity. They were deeply interested, as was Mr. Crook, in the success of the effort to pay the debt on the church, and they acted in unison. But what the trustees did was not prompted by any request from Mr. Crook. They were co-laborers in promoting a common object. We can but regret that the intention of the intestate in respect to a matter in which he was deeply interested, and whose interest was manifested up to the very time of his death, is thwarted by the conclusion we have reached. But we think there is no alternative, and that the order should be affirmed.

ERECTION OF CHURCH EDIFICE IS SUFFICIENT CONSIDERATION to authorize recovery on a subscription made for the purpose of such erection: *McDonald v. Gray*, 11 Iowa, 508; 69 Am. Dec. 509. And when a person subscribed toward the payment of a debt due for the building of a church, and the trustees borrowed money to pay the debt on the faith of the subscription, it was held that the subscriber was bound: *Trustees v. Garvey*, 53 Ill. 401; 5 Am. Rep. 51. And see *Philomath College v. Hartless*, 6 Or. 158; 25 Am. Rep. 510. But where one executed his note to the trustees of a church, as a donation to enable them to buy a bell, and died before the bell was ordered, it was held that the note could not be enforced, although the bell was afterward ordered: *Pratt v. Trustees etc.*, 93 Ill. 475; 34 Am. Rep. 187.

HOPPER v. SAGE.

[112 NEW YORK, 530.]

CORPORATE STOCK. — DIVIDENDS BELONG TO THE OWNER OF THE STOCK AT THE TIME THEY ARE DECLARED, although they are made payable at a future date. This rule cannot be displaced or overcome by evidence showing a usage of the stock exchange to the contrary.

USAGE AND CUSTOM CANNOT BE PROVED TO CONTRAVENE A RULE OF LAW, or to alter or contradict the express or implied terms of a contract free from ambiguity, nor to make the legal rights or liabilities of the parties to a contract other than they are by the terms thereof.

ACTION for damages for alleged breach of contract. The contract was as follows:—

"A. 3099.

NEW YORK, May 23, 1878.

"For value received, the bearer may deliver to me on one day's notice, except last day, when notice is not required,

five hundred shares of the common stock of the Chicago and Northwestern Railway Company, at forty-nine per cent, and then, in thirty days from date, the undersigned is entitled to all dividends or extra dividends declared during that time.

"Expires 1:3-4 o'clock, P. M.

"RUSSELL SAGE."

The company referred to in this contract on May 16, 1878, declared a dividend of three per cent on its capital stock, payable on the 27th of June, 1878. It was admitted that at the time, while the contract was in force, there was a rule of the Stock Exchange of New York as follows: "On the day of the closing of the transfer-books of any stock for a dividend, transactions in such stock for cash shall be 'dividend on,' up to the time officially designated for the closing of the books; all transactions other than for cash shall be 'dividend off' after after a quarter-past two o'clock, P. M., or after the closing of the books, should they close before that hour." It was further admitted that in conformity to the above rule the stock of the above-named company was, on June 18, 1878, quoted and dealt in upon the Stock Exchange "dividend off." Before 1:30, P. M., of June 22, 1878, the plaintiff's testator tendered to the defendant five hundred shares of stock, demanding therefor forty-nine dollars per share, but the defendant refused to receive and pay for the stock at any rate greater than forty-six dollars per share. This sum the decedent refused to take, and declared to the defendant that he should hold him for the difference between forty-nine dollars and forty-six dollars per share. The refusal of the defendant was based upon the theory that he was entitled to the dividend which had been declared on the stock on the 16th of May. Verdict was ordered to be entered for the plaintiff for the amount claimed, together with interest.

Henry S. Bennett, for the appellant.

S. Jones, for the respondent.

PECKHAM, J. The only question in this case is as to whether the defendant was entitled to insist upon his claim to the dividend on the common stock of the railway which had been declared on the 16th of May, and was payable on the 27th of June, 1878. It has been held a number of times in this court that when a dividend is declared it belongs to the owner of the stock at that time, but that until such declaration the profits form part of the assets, and an assignment by a stockholder

before such declaration carries with it his proportional share of the assets, including all undeclared dividends. This is so in regard to dividends declared, but which are payable at a future time, and such dividends belong to the owner of the stock when declared. The declaration of the dividend is in legal contemplation a separation of the amount thereof from the assets of the corporation, which holds such amount thereafter as the trustee of the stockholder at the time of the declaration of the dividend. In the absence, therefore, of any provision in a contract of sale and purchase of stock, outside of and not subject to the rules of the Stock Exchange, the law declares that such a contract gives the dividends to the owner of the shares when the dividends were declared. This rule was announced in *Boardman v. Lake Shore etc. R'y Co.*, 84 N. Y. 157; *Jermain v. Lake Shore etc. R'y Co.*, 91 Id. 483, 492; and in *Matter of Kernochan*, 104 Id. 618.

On looking at the contract in question, it is seen that the parties did make some provision as to dividends, and it was agreed that the defendant was to be entitled to all dividends or extra dividends declared during the time of its running, that is, for thirty days from the date thereof, which was May 23, 1878. But that provision did not include the case of a dividend which had already been declared, and as to that dividend the contract was silent, and the law itself fixes the ownership thereof just the same as if it were thus provided in so many words in the contract. To overcome this result, the counsel for the defendant endeavored in many and various ways to show that, by usage of the Stock Exchange, a person situated as was the defendant with reference to this stock and under precisely the same liability as the defendant, under the contract in question, was entitled to the dividend which had been declared, and which each party to this action now claims. All the various offers to prove facts, and all the various questions asked of different witnesses, had this one result for their object, which was to change the law on the subject by reason of this custom or usage claimed to be prevalent on the New York Stock Exchange.

We think the learned trial judge correctly refused to permit evidence of this nature to be given. Usage and custom cannot be proved to contravene a rule of law, or to alter or contradict the express or implied terms of a contract free from ambiguity, or to make the legal rights or liabilities of the parties to a contract other than they are by the terms

thereof. When the terms of a contract are clear, unambiguous, and valid, they must prevail, and no evidence of custom or usage can be permitted to change them: *Markham v. Jaudon*, 41 N. Y. 236; *Bradley v. Wheeler*, 44 Id. 495; *Baker v. Drake*, 66 Id. 518; 23 Am. Rep. 80; *Colgate v. Penn. Co.*, 31 Hun, 297-299.

In *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407, evidence was held proper of the existence of a custom among plasterers, in Buffalo, as to the particular manner of measuring the number of square yards plastered. It was admitted because, as the court said, the contract for the payment for the work done was not so plain in its terms as that there could be but one conclusion as to the mode of measurement by which the number of square yards could be arrived at. Usage, it was said, was to be considered as entering into and forming a part of a contract, when the usage was reasonable, uniform, well settled, not in opposition to fixed rules of law, and not in contradiction of the terms of the contract.

The evidence offered in this case would have been inconsistent with the rules of law, and would have contradicted the plain terms and legal effect of the contract. This is not a case where, by the terms of the contract made between members of the Stock Exchange, its rules and regulations are to control in its interpretation and obligations. Nor was it made under such circumstances that those rules and regulations could have any legal effect. The contract was made at the office of the defendant, and by a broker for plaintiff's decedent, who as to this contract, at all events, was not acting as a member of the Stock Exchange, and, so far as the case shows, he was not a member thereof.

Upon the question of damages, the proof was uncontradicted that at the time of the tender of the stock, when the defendant should have paid the plaintiff's decedent forty-nine dollars a share for the stock, in compliance with his agreement, the stock was selling at forty-six dollars per share, and that was its market value.

There was no error committed on the trial, and the judgment entered upon the verdict for the plaintiff should be affirmed, with costs.

FUNDS OF CORPORATION ARE TO BE DISTRIBUTED AMONG THOSE who are its stockholders at the time when the dividend is declared, no matter when such funds accrued: *Goodwin v. Hardy*, 57 Me. 143; 99 Am. Dec. 758, and note 762.

DIVIDENDS ON PREFERRED STOCK: *Hazeltine v. Belfast etc. R. R. Co.*, 79 Me. 411; 1 Am. St. Rep. 330.

CUSTOM OR USAGE TO BE LEGAL AND VALID must not be in opposition to positive law: *Dickinson v. Gay*, 7 Allen, 29; 83 Am. Dec. 656, and note 664. And to permit usage to govern and modify the law in relation to the dealings of parties, it must be uniform, certain, and sufficiently notorious to warrant the legal presumption that the parties contracted with reference to it: *Citizens' Bank v. Grafflin*, 31 Md. 507; 1 Am. Rep. 66; and see *Brown v. Foster*, 113 Mass. 136; 18 Am. Rep. 463; *Randall v. Smith*, 63 Me. 105; 18 Am. Rep. 200, and note 204.

ORLEANS COUNTY NATIONAL BANK v. MOORE.

[112 NEW YORK, 543.]

APPLICATION OF PAYMENTS. — The right of a creditor to apply payment made to him by his debtor to one claim rather than another is confined to cases of voluntary payments.

VOLUNTARY PAYMENT, WHAT IS NOT. — Moneys realized from a foreclosure sale are not voluntary payments, although the mortgage foreclosed was voluntarily made.

APPLICATION OF PAYMENT REALIZED BY A JUDICIAL SALE, where the judgment included several distinct demands, must be among such demands *pro rata*, and the creditor has no right to elect to appropriate such payment to the satisfaction of one of such demands in preference to another.

ACTION to foreclose a mortgage. The appeal was from an order determining what application should be made of moneys realized from the sale under the foreclosure.

Walter S. Logan, for the appellant.

John H. White, for the respondent.

PECKHAM, J. The question in this case arises as to the application of moneys which are the proceeds of the sale of certain lands on foreclosure of a mortgage given by one George B. Church to the plaintiff herein, on the twenty-second day of August, 1884. On that day the plaintiff owned and held a note for two thousand five hundred dollars, made by Albert S. Warner (who was then wholly insolvent), and indorsed by George B. Church, dated July 3, 1884, and due September 4, 1884. The plaintiff at the same time held and owned a note of five thousand dollars, made by Church, and indorsed by one Charles H. Moore, dated June 21, 1884, and due August 23, 1884; also a draft drawn by Church upon and accepted by said Moore for seven thousand five hundred dollars, dated August 9, 1884, and due August 23, 1884. Moore was an accommodation acceptor of the draft, and Church was the prin-

principal debtor therein, and also on the five-thousand-dollar note, and was so known to be by the plaintiff before the execution of the mortgage. He was simply indorser on the two-thousand-five-hundred-dollar note, and Warner was, in fact, the principal debtor, and was so known to be by the plaintiff. On the date above mentioned, plaintiff's cashier requested Church (who also turned out to be insolvent) to execute a mortgage to the plaintiff as collateral security for his indebtedness, which Church agreed to do, and thereupon he went to an attorney to draw the same, and directed him to draw it for twelve thousand five hundred dollars, the amount of the five-thousand-dollar note and the seven-thousand-five-hundred-dollar draft above mentioned. Before the mortgage was executed, however, the president of the plaintiff informed Mr. Church that it did not include all his liabilities to the plaintiff, and requested that the mortgage be made to include the Warner note, upon which he was indorser, and Church consented, and thereupon the mortgage was made for fifteen thousand dollars, which included the three liabilities. The mortgage was conditioned for the payment of fifteen thousand dollars to the plaintiff one year from date, and contained this further condition: "This grant is intended as security for the payment of fifteen thousand dollars, one year from date, that is to say, as a collateral security for the payment of all notes, bills, drafts, checks, or over-drafts, or indebtedness of every name or nature due and owing the said Orleans County National Bank by said George B. Church, to the amount of fifteen thousand dollars, at the termination of one year from the date hereof; nevertheless, the security hereby created shall continue and remain in full force after the expiration of said year, until all and every indebtedness due and owing from said George B. Church to said bank is paid and liquidated."

The plaintiff continued to hold the notes up to the time when the mortgage was foreclosed. Judgment of foreclosure was entered in the Orleans County clerk's office, in an action brought by the plaintiff against the mortgagor and the said Charles H. Moore and others, on which judgment the mortgaged premises were advertised for sale, and the same were sold on the ninth day of February, 1886, and they were bid off by the defendant Moore for nine thousand six hundred dollars. Neither Church nor Moore appeared in the foreclosure action, and no personal judgment was demanded against Moore in the complaint. Upon entering judgment

by default, the plaintiff's attorney, *ex parte*, entered in the judgment a direction to the sheriff to apply the proceeds of the sale of the mortgaged premises, first, to the payment of the note made by Albert S. Warner and indorsed by the defendant Church, and the remainder, so far as necessary, to the payment of the draft and note held by the plaintiff, and upon which the said Moore was liable as surety. The first knowledge which Moore had that this provision was inserted in the judgment was after the sale of the mortgaged premises, and after he had retained counsel to examine the papers in the foreclosure action, when upon such examination by his counsel the direction in the judgment was discovered. Upon the judgment roll in the foreclosure suit, and upon affidavits stating these and other facts, the defendant Moore then moved for an order erasing from the judgment the direction above alluded to, and for other relief. The motion was opposed by the plaintiff upon affidavits then filed, and the court at special term ordered that the direction above mentioned should be erased. It was further ordered that the sheriff pay the proceeds of the sale of the mortgaged premises to the plaintiff, after deducting his fees and expenses; and upon consent of the parties, a reference was ordered to determine how the net proceeds of the sale should be applied. The money thus paid to the plaintiff amounted to \$9,467.11, which was not put in with its other money, but was made a special deposit, "as per order of the supreme court." The plaintiff claims the right to apply the proceeds of the sale, first, to the extinguishment of the Warner note, and the balance upon the note for five thousand dollars, and the draft for seven thousand five hundred dollars. The defendant Moore claimed below that the application should be wholly made upon the note and draft upon which he was liable. The referee applied the proceeds *pro rata* upon the three pieces of paper upon which Church was liable. The report of the referee was confirmed by the special term, and plaintiff then appealed to the general term. The defendant Moore did not appeal. The general term affirmed the order of the special term, and from the order of affirmance the plaintiff has appealed to this court. The question then arises as to what, if any, right the creditor has to make the application, or whether the law is to make it, and if the latter, upon what rule it is to be based.

The right of a creditor to apply a payment made to him by a debtor, in the absence of any application by the debtor,

seems to be confined to cases of voluntary payments: *Cowperthwaite v. Sheffield*, 1 Sand. 416, 453, 454. In that case, the holder of ten bills of exchange, drawn by the same drawers, but indorsed by different parties, sued the drawers thereon in England, and seized, under process of outlawry (they being •non-residents, and not appearing in the suit), funds of the drawers there sufficient to pay half of the aggregate amount, and obtained judgment for the whole of the ten bills, and applied the funds so seized upon eight of the ten bills, to the exclusion of the other two, under the assumed right arising from the warrant and the queen's grant on the outlawry, which expressly appropriated such moneys to the eight bills exclusively. In a suit in this state by the holder of the two bills against the indorsers thereof, it was held, however, that the plaintiffs in the English suit (who were really represented by the plaintiffs in the suit here) had no right to make the application in the way they did, notwithstanding the outlawry proceedings and the warrant and queen's grant for such application, and that the funds they received in England must be applied ratably to the discharge of all the ten bills embraced in the suit. The judgment was affirmed by this court in 3 N. Y. 243; and at page 253 this particular subject was adverted to, and the principle adopted by the lower court approved.

So in this case, if the mortgagor, by the condition in the mortgage, did not make an application of the moneys which might arise from a sale of the mortgaged premises to any particular debt, such moneys having arisen from a foreclosure and sale of the premises, and coming into the hands of the plaintiff (through the sheriff) by reason thereof, and in a judicial proceeding, their application would properly be made by the court, and upon equitable principles.

See also *Blackstone Bank v. Hill*, 10 Pick. 129, where it was held that the right of a creditor, having several demands against his debtor, to appropriate a payment to any one of them, if his debtor at the time of payment made none, is applicable only to voluntary payments. See also, to the same effect, *Cage v. Iler*, 13 Miss. 410; 43 Am. Dec. 521.

It cannot be said that the moneys are paid voluntarily when they arise upon a foreclosure of a mortgage voluntarily given as a security for the payment of the debts of the mortgagor. The security is a voluntary one, but when the creditor resorts to legal proceedings for the purpose of enforcing it, the moneys

arising from the judicial sale of the lands mortgaged are paid over to the creditor, and come to his hands as a payment made by the law, and which payment the law will therefore apply as shall be just and equitable, in the absence of directions already made in the security itself executed by the debtor.

Upon the facts in this case, what application of the money, then, should the law make? In looking through the decisions, both English and American, I concur fully with the remarks made by Vanderpoel, J., in *Cowperthwaite v. Sheffield*, *supra*, wherein he states that the subject of the application or imputation of indefinite payments is one upon which the decisions of the common-law courts have been lamentably conflicting. In *Stone v. Seymour*, 15 Wend. 19, Chancellor Walworth expressed himself much to the same effect, and in *Pattison v. Hull*, 9 Cow. 767, Judge Cowen, with his usual fullness of learning, entered upon an elaborate review of the authorities, both in England and in this country, and still found himself somewhat in doubt as to what was the settled law on the subject, and it is somewhat confused at the present time.

Judge Story, in his work on equity jurisprudence, section 459 e, says: "Notwithstanding there are contradictory and conflicting authorities on this subject in the English and American courts, one should think that the doctrine of the Roman law is, or ought to be held, and may well be held, the true doctrine to govern in our courts. There is a great weight of common-law authority in its favor, and in the conflict of judicial opinion that rule may well be adopted which is most rational, convenient, and consonant to the presumed intention of the parties." Going back to the civil law, therefore, for some enlightenment upon the principles to be adopted in cases of this nature, in 1 Domat's Civil Law, by Strahan, Cushing's ed., p. 905, we find a short treatise entitled "Of the imputation of payments," article 3 of which, in speaking of the cases where a debtor owes several debts to one and the same debtor, and has made several payments, of which the application has not been made by either party and where it is necessary to be regulated by the court, says: "The payment is applied rather to a debt of which the non-payment would expose the debtor to some penalty, or to costs or damages, or in the payment of which his honor might be concerned, rather than to a debt of which the non-payment would not be attended with such consequences. Thus a payment is applied to the discharge of a debt for which a surety is bound, rather than to acquit what

the debtor is singly bound for without giving any security, or to the discharge of what he owes in his own name, rather than of what he stands engaged for as surety for another." The seventh rule, at page 908, provides that "when a debtor, obliging himself to a creditor for several causes at one and the same time, gives him pawns or mortgages which he engages for the security of all the debts, the money which is raised by the sale of the pawns or mortgages will be applied in an equal proportion to the discharge of every one of the debts."

In *Perris v. Roberts*, 1 Vern. 34, 2 Ch. Cas. 83, a similar rule is held. In that case, Perris was surety on a bond executed by J. S. to Roberts. J. S. owed Roberts another debt upon simple contract, and they came to a stated account for all the moneys owing by J. S. to Roberts, and the sum of eighty-five pounds was found to be the amount due, for which sum J. S. executed a bill of sale. The property contained in the bill of sale having been sold, and the proceeds not being sufficient to pay the eighty-five pounds, it was contended, on the part of counsel for Roberts, that the money should first be applied on the simple-contract debt, and what remained, on the debt for which the plaintiff stood as surety. On the other hand, it was contended that, both of the debts having been blended and thrown together, and the bill of sale made to secure the whole debt, it should be applied proportionally. The report ends in this way: "And it was so decreed by the lord chancellor, and solely upon this reason, viz., that both the debts had been cast into one stated account, and the bill of sale made towards the satisfaction of the whole debt." Upon the same principle, it may be claimed that all the debts of the mortgagor were provided for in this mortgage, or in other words, cast into one stated account; because they were all added together, and the mortgage given as security for the whole, and not as security for one any more than another. The same principle which would apply *pro rata* the moneys derived from the bill of sale to the debt upon the bond in which Perris was surety, as well as upon the account, would apply the moneys arising upon a sale of the mortgaged premises in this case *pro rata* to the indebtedness of Church, for which Moore was surety, as well as to the Warner note upon which Church was indorser only. In Story on Bailments, in the latter part of section 312, the doctrine is laid down that "if the thing is pledged to one and the same creditor for several debts, and the pledge, when sold, is not sufficient to pay

all the debts, the money arising from the sale is to be paid proportionally to all the debts, to extinguish the same *pro tanto*."

Following out somewhat the same principle, the Massachusetts supreme court, in the case of *Commercial Bank v. Cunningham*, 24 Pick. 270, 35 Am. Dec. 322, decided that where an insolvent debtor assigned his property for the benefit of such of his creditors "as become parties to the assignment, and thereby release their claims," and a dividend is received by one of such creditors, it must be ratably applied to all his claims against the debtor, as well to those upon which other parties are liable and which are otherwise secured, as to those which are not so secured; and the court held that it was not a case in which the debtor or the creditor had the right to make the application of any payment, for the application was to be made by the law according to the circumstances and justice of the case. The late Judge Allen, while he was a member of the supreme court, delivered an opinion in *Bridenbecker v. Lowell*, 32 Barb. 9, as one of the general term, wherein he held that where a creditor, having several claims against his debtor, receives a portion of the entire amount in a judicial proceeding founded upon them all, as the foreclosure of a mortgage given to secure all the debts, the law will apply such money as a payment ratably upon all the claims, the creditor having no right to apply it to the satisfaction of some of the demands, especially for the payment of a debt, for the payment of which a specific fund had been provided to the entire exclusion of the others; and where the intent of the party to the mortgage was to provide a security for all the debts of the mortgagor, and not to secure one debt, and then the next debt upon the residue of the mortgage, but rather that all should stand as if contracted at the same time, it was held that the debts must share ratably in the funds realized from the security, without regard to priority of date. The mortgage in that case was given by the maker of the notes to the bank, and was conditioned as a security "to pay to the said bank all paper then held, or thereafter to be held, by the said bank upon which the said Gates should be liable as maker, indorser, or acceptor."

The moneys arising from foreclosure of the mortgage were not sufficient to pay all the paper upon which the mortgagor was liable, and it was held that the bank had no right to make the application of the payments to any particular debt which

was unsecured, but that all the paper upon which the mortgagor was liable should come in and share *pro rata* in the funds realized from the sale of the mortgaged premises. This opinion was concurred in by the other judges at the general term, and, so far as I can find, has never been reversed or overruled. The case of *Cory v. Leonard*, 56 N. Y. 494, while not precisely in point, nevertheless states the principle in accord with the above rule. In that case, the bank was paid the full amount of its indebtedness by one of the sureties, who thereupon took the securities which had been given to the bank as collateral for all the debts owing by the principal debtor, and that surety claimed the right to apply the moneys received from the collateral to the payment in full of the debt for which he was surety, and then endeavored to collect the balance of a debt, for which another was surety, from him. The difference in the two cases, of course, lies in the fact that the bank in the *Cory* case was paid in full, and a dispute arose between the different sureties upon the different debts of the same principal; but it was said in the opinion, and the case proceeded upon that theory, that the surety who paid the debt of the bank, and thus became subrogated to its rights, occupied simply the same position in regard to its securities that the bank did; and that the rights of the two sureties in the collaterals were equal in degree, and differed only in the amount of their respective liabilities, and those rights could not be changed by the transfer to one of the sureties upon his payment of all the indebtedness to the bank for which the security was given.

Nor is there anything in the facts of the case of *Harding v. Tift*, 75 N. Y. 461, at all inconsistent with the principle contended for here. In that case there were two demands against one Skinkle held by the plaintiff, and a payment was made by him to the plaintiff, and as was established by the verdict, without any direction being given by Skinkle as to which of the two debts the money should be applied upon. It was contended, upon the part of the defendant, that as there was a surety for one of the debts, the money thus paid must be applied to that debt in preference to the debt for which there was no security. It was held, however, that the creditor had the right to apply it upon either of the demands which he held against the debtor, in the absence of any direction given by him, and that this right was not affected by equities existing between the debtor and a third person, of which the creditor

had no notice. In the course of his opinion, Rapallo, J., said. "It is contended that the right of the creditor to the application is subject to the condition that such application be not inequitable, and such is the language used in some of the authorities cited. The equities referred to, however, are usually the equities existing between the debtor and creditor, and I have found no case recognizing those arising out of transactions between the debtor and third persons of which the creditor has no notice. The mere fact that there is a surety for one of the debts does not preclude a creditor from applying a payment thus received to the debt for which he has no security. . . . The money belongs to the debtor, and where the creditor is ignorant of any duty on the part of the debtor in respect to it, he may receive and apply it as if no such duty existed. If no application has been made by either party, and the duty were cast upon the court of making the proper application, the equities of the surety would, doubtless, be considered. But where the application has been made by the creditor in accordance with his apparent legal right, and in ignorance of any fact which should prevent him from making such application, I do not think he is bound to change it on the subsequent disclosure that a third party had an interest in having it otherwise applied, and that the debtor had violated a duty to such third party in not directing such application. The application made by the creditor cannot be said to have been inequitable, if no facts were brought to his knowledge at the time showing that he ought not to make it. It would create great confusion in commercial dealings to hold that, after the lapse of time, and when the position of the parties may have been changed by such a payment, the transaction could be reopened, and the creditor obliged to revive an unsecured debt which he had treated as paid, and apply the payment on a debt for which he had ample security." In this case, it will be seen, the debtor made the payment voluntarily, and that he made no disclosure of the source from which the money came which he paid to his creditor; and the further fact appears that the creditor actually applied the money thus paid to him upon one of the debtor's two debts, and in ignorance of any equities existing between the debtor and any third party. Judge Rapallo, in his opinion, expressly states that if the court were to make the application, upon all the facts being known, the equities of the surety would be considered. There is one case in Massachusetts, *Wilcox v. Fair-*

haven Bank, 7 Allen, 270, which holds a different doctrine. In that case, the debtor to the bank conveyed to it certain personal property to be held by it as security for the payment of several promissory notes and drafts, upon which he was then, or might within two years thereafter become, liable. The personal property was sold for the purpose of paying the liabilities of the debtor upon various pieces of paper, some of which had no sureties, and others had different sureties upon them. The property not realizing enough to pay all the liabilities to the bank, it claimed the right to first apply the money to the payment of the note upon which the debtor was alone liable, and that being extinguished, then upon the paper upon which the debtor and his sureties who might be insolvent were liable, and the balance, if any, upon the paper with solvent sureties. The court decided that the bank had the right so to do, and upon two grounds: one of which was, that the sureties had no claim to be subrogated to the rights of the bank in the security without paying or tendering payment in full of all the debts for which the security was given. This they had not done. With this decision upon the rights of subrogation no fault can be found. But the further ground was taken that the bank had the right to appropriate the whole proceeds of the mortgaged property to any debt which it chose, and it could therefore exercise such right by applying the moneys in the manner claimed by it as above stated.

No authority is cited for such a position, and we think such an application would be inequitable under all the circumstances of the case, and having in view the general rule upon this question as laid down in the civil law and in cases at the common law following it, as above referred to. The principle decided in that case leaves out of view entirely all rights or equities of the surety. The law has always regarded a surety as having some rights in the security, though furnished directly by the debtor to the creditor. The security having been furnished by the debtor, the creditor must dispose of it upon equitable principles, and these equitable principles are entirely lost sight of in the case referred to.

The case of *Field v. Holland*, 6 Cranch, 9, has not been overlooked. It was a case where payments had been voluntarily made, but no application of them had been directed by the debtor at the time of such payments. Subsequently he contended that they should have been applied on the judgment in question, to its extinguishment. The court, per Marshall, C. J.,

determined that all payments should be applied to debts existing when the payments were made, and it appearing that there were sundry demands against the debtor at the times which were not secured by judgment, the payments should be first applied to extinguish those demands, and the balance only should be applied on the judgment. It was said by the learned chief justice, that it appeared that the application of the payments had actually been made by the creditor in the manner which the court adjudged should be done. Such application was also held to be supported by general principles as well as by the particular circumstances of the case. The case is cited in *Pattison v. Hull*, 9 Cow. 767, where Cowen, J., says of it, that he was "persuaded that had the attention of the learned chief justice, who delivered the opinion in the case of *Field v. Holland*, been drawn to the great preponderance of authority the other way, his conclusion would have been the same with that of the court in Maryland."

In *Guinn v. Whittaker's Adm'r*, 1 Har. & J. 754 (A. D. 1805), Chase, C. J., said he regarded the principle as firmly established in that state, and that it was in harmony with the English decisions that "if the debtor is indebted on mortgage and simple contract, or on bond and simple contract, and when he makes a payment should neglect to apply it, the law will make the application of it in the way most beneficial to the debtor, that is, to the mortgage or bond." To the same effect is *Dorsey v. Gassaway*, 2 Id. 402, 411, 412; 3 Am. Dec. 557 (A. D. 1809). None of these cases is exactly in point, yet the one in *Cranch*, where the payment was voluntary and no direction given by the debtor, does allow the creditor to apply it as he pleases, and also says that the court would apply it, if he had not, to the debt for which the creditor had the least security.

But in such a case as this, where neither party has applied the payment, and the moneys came from the course of judicial proceedings to enforce the security intended as such for all the debts, we think the weight of authority as well as the equities of the case call for the application of the moneys arising in such judicial proceedings to all the debts *pro rata*, especially where the debt to which the bank in this case desires to apply the moneys, in order to its entire extinguishment, is one for which the debtor is bound only as surety, and where such an application would work injustice to the debtor as to his debts for which another was bound as his surety.

The case of *National Bank of Newburgh v. Bigler*, 83 N. Y. 51, 63, is not inconsistent herewith. There was no question of the rights of sureties involved in the case. The debtor owned a judgment against the city of New York (but which was still in controversy), and assigned it by an assignment, absolute in form, to the creditor to the extent of fifty thousand dollars. The evidence showed that the assignment was intended as a general security to the creditor for the indebtedness of the debtor, but it was delivered without any express condition, and without any direction as to the application of its proceeds. The judgment was subsequently reversed, but upon a compromise, to which the assignor of the judgment assented, the sum of about forty-four thousand dollars was paid by the judgment debtor, the city of New York, to the creditor, with the assent of such assignor. Before such payment he demanded that the amount received from the city should be applied upon certain specific debts of his, which the creditor refused to do, and did apply such payment upon certain other debts of the debtor. This court held that when the payment was made by the city to the bank (the creditor), it was the money of the bank, and was not that of the debtor Bigler, who had no ownership or control over it, because he had long ago parted with the right to receive it. Not having directed how the money should be applied when he assigned the judgment, and having parted with his ownership without condition, he was held not able to dictate what the bank should do with its own money. This is no such case.

The authors of the learned note to the cases of *Mayor etc. v. Patten*, 4 Cranch, 317, and *Field v. Holland*, 6 Id. 8, as found in 1 American Leading Cases, 286, at page 300, in speaking of applications of payments by the law, say the general rule is to appropriate the payments to all the debts ratably, but that it is very difficult to determine when the principle becomes properly applicable; and they cite the case of *Blackstone Bank v. Hill*, 10 Pick. 129, as recognizing the rule that the right of application by the creditor, when the debtor omits to make it, does not apply to cases of payment *in invitum*, or by process of law. Many cases are cited in the note on this branch, but the authors finally assert their belief that the general principle of the common law is, that the ownership of the money determines the right of appropriation, and after it is paid the debtor can make none. It would seem that in cases of payment *in invitum*, or by judicial proceedings, the

creditor does not become the owner of the money until it is paid, and the law at the very time of the payment makes its own application, and the creditor has no opportunity to make it himself. It were an endless if not an unprofitable task to cite and comment upon the vast number of inconsistent and almost contradictory cases, both English and American, upon this somewhat confused branch of the law. We are disposed to follow the rule laid down in *Bridenbecker v. Lowell*, *supra*. The opinion in that case was written by a judge who was for many years a member of this court, and who had a long judicial experience, and his learning and ability have been universally recognized. His opinion in that case is marked with evidences of great care and research, and we think it is based upon authority and sound reasoning.

Upon a review of the whole case, we are of opinion that the order of the general term was right, and should be affirmed, with costs to the defendant Moore.

RULE AS TO APPLICATION OF PAYMENTS: *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597, and cases collected in note 603.

WHEN PAYMENT IS TO BE REGARDED AS VOLUNTARY, and when compulsory: *Vick v. Shinn*, 49 Ark. 70; 4 Am. St. Rep. 26, and note 30

HUSSEY v. COGER.

[112 NEW YORK, 614.]

MASTER AND SERVANT. — A SUPERINTENDENT UPON WHOM IS DEVOLVED the whole management and control of work, and who is authorized to employ and discharge workmen, to regulate and direct the manner of their work, to provide the means and appliances necessary for its prosecution, and to determine the time and place of its employment, may be regarded as standing in the place of his master, and while in the discharge of his duties as such superintendent he is not deemed a fellow-servant with the other employees of his master who are under his control.

MASTER AND SERVANT. — A SUPERINTENDENT OR VICE-PRINCIPAL MUST BE REGARDED AS A FELLOW-SERVANT with other employees of his master who are under his charge and control, when he is not discharging the duties of superintendent or vice-principal, but is engaged in the performance of duties which properly belong to an ordinary servant or employee. Hence, where a servant was injured from the negligence of his superintendent in directing operations respecting the uncovering of a hatchway, it was held that the defendant could not recover of the master for the injuries suffered, because the superintendent was not at the time acting as such, but was rather discharging the duties of a fellow-servant.

ACTION by an administratrix to recover damages for the death of her intestate, whose death it was claimed was caused by the negligence of the defendant. Judgment for plaintiff.

Charles W. Dayton, for the appellant.

Frank E. Blackwell, for the respondent.

RUGER, C. J. This action was instituted by a servant of the defendant to recover damages for an injury received in the course of his employment. After a verdict the servant died, and the action was revived by his administratrix, who was substituted as plaintiff to defend an appeal. While there was much controversy on the trial as to some of the collateral facts of the case, there was none as to the controlling circumstances which, in our judgment, determine the non-liability of the defendant. We are of the opinion that there was no evidence upon which a charge of negligence can justly be imputed to the defendant. The claim of liability is based upon the alleged negligence of the defendant in the performance of some duty which he, as master, owed to those in his employ, and which resulted in the accident from which the servant received his injury. The defendant was a carpenter and contractor, engaged in the business of altering and repairing the interior of vessels, lying in the port of New York, for whosoever might need his services. He had entered into contract with the owners to make repairs upon the Wyoming, an ocean steamer, employed, among other things, in the transportation of fresh meat, and needing alterations in its hold to accommodate the traffic in which she was engaged. The defendant had employed for the performance of the work a superintendent, who had general charge of the job, and authority to engage all workmen under him necessary to perform the contract. The plaintiff's intestate was a ship-joiner, and was one of the men so employed. The defendant exercised no personal supervision over the work, but devolved its whole management and control upon the superintendent, who was authorized to employ and discharge workmen; to regulate and direct the manner of their work; to provide the means and appliances necessary to its prosecution, and determine the time and place of its performance. The superintendent was employed by the master as his servant; but was delegated with the discharge of all those duties which, in the conduct of such work, rested upon the master to perform in

respect to the person employed thereon. So far as this action is concerned, he may, therefore, be regarded as standing in the place of master to the person employed in the work: *Corcoran v. Holbrook*, 59 N. Y. 520; 17 Am. Rep. 369; *Pantzar v. Tilly Foster Mining Co.*, 99 N. Y. 373.

It is not, however, every act of a superintendent for which a master is liable; for notwithstanding his general supervisory power, he is still a servant, and in respect to such work as properly belongs to a servant to do is, while performing it, discharging the duty of a servant, for whose negligence and carelessness the master is not responsible to co-servants: *Crispin v. Babbitt*, 81 N. Y. 516; 37 Am. Rep. 521. It was said in the *Crispin* case that "the liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. . . . The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance." In that case, while the plaintiff was engaged in lifting the fly-wheel of an engine off its center, the superintendent carelessly let the steam on and started the wheel, throwing the plaintiff onto the gearing-wheels, and thus occasioned the injuries complained of.

There is no question in this case but that the superintendent employed was a fit and competent person to have charge of the work to be done, or but that he was a skillful and experienced workman; and the sole question in the case is, whether the special work in which he was engaged at the time of the accident belonged to the class which pertained to the duty of a master to perform or not. In considering this question, it is not necessary to limit or restrict the rules defining the general duties and obligations of masters, engaged in mechanical employments, to their servants; for, under the broadest definition laid down in the authorities, we think the

respondent fails to bring this case within the rule imposing liability upon masters. The case of *Pantzar v. Tilly Foster Mining Co.*, *supra*, is referred to by the respondent as sustaining the recovery, and the questions may, therefore, be tested by the rule there laid down, without doing injustice to the plaintiff. It was there said that "the master owes the duty to his servant of furnishing adequate and suitable tools and implements for his use, a safe and proper place in which to prosecute his work, and, when they are needed, the employment of skillful and competent workmen to direct his labor and assist in the performance of his duties."

In that case, the servant had been assigned to labor under an overhanging ledge in a mine, which had become disintegrated and cracked, to the knowledge of the master, and threatened to fall upon and injure those working beneath it. We held that the master was charged with the duty of exercising care and prudence in the protection of his servants from the known and inherent dangers of the situation, and having failed to perform that duty, was liable to his servants for an injury arising from an omission to do so. The proof in this case does not show that the master omitted the performance of any such duty. He had provided a skilled and competent man to superintend and direct the work, a sufficient force, with all necessary and proper means and appliances, to perform it, and a safe place, free from any inherent dangers, in which to carry it on. He was not chargeable with the consequences of a place for work made dangerous only by the carelessness and neglect of fellow-servants, or for the negligent manner in which they used the tools or materials furnished them for their work.

The plaintiff's intestate, at the time of the accident, was engaged in the hold of the vessel, repairing a bulk-head situated near the hatchway. Three decks extended above him, having corresponding openings, constituting hatchways, and were ordinarily covered by hatches; but when uncovered, presented an open space some twelve or fifteen feet square, reaching from the hold, where the plaintiff's intestate was engaged, through all of the decks to the spar-deck, some twenty-five feet above him. This vessel was constructed in the usual and ordinary mode of such steamers, and there was nothing about the arrangement of the hatchways, their appliances, or the various decks of the vessel, which presented any danger,

if used in their usual and customary manner, to those employed about them.

Upon the occasion in question, the superintendent stood on the spar-deck, near the hatchway, and had occasion to cause a water-tank to be let down from the main deck to the hold. In order to do this, it was necessary to uncover the hatchway on the main deck. He directed the foreman of the men in the hold to send up assistants to do this work, and two men, viz., Holbrook and Torrey, were sent on this service. The men usually worked in pairs, and Torrey was Holbrook's assistant. These hatches were quite heavy, and the work of removing them was considered dangerous, and two men were invariably employed in its performance. The hatches consisted of thick plank about six feet long and two and a half broad, and having holes cut in the corners at the respective ends diagonally opposite, to enable the men handling them to secure a firm hold. When Holbrook and Torrey arrived at the hatchway, they advanced on opposite sides towards it, and Rouse, another employee, had also approached it on the side opposite Holbrook, in a position to assist him, when the superintendent called out saying, "Holbrook, take off that hatch." Holbrook thereupon seized one end of the hatch, and supposing either Rouse or Torrey held the other end, lifted and pulled it from its resting-place. Torrey and Rouse, each waiting for the other, did not, in fact, get hold of the hatch, or if they did, they let go, and it fell through the hatchway, twisting itself by its weight out of Holbrook's hands, and after striking the steerage deck, bounded off and fell into the hold, striking the plaintiff's intestate on the leg, breaking it in several places. It appeared that the decedent left the place where he was at work and was comparatively safe, and had advanced under the hatchway to obtain some nails, to use in his work, from a keg placed there by some one, but by whom does not appear. While thus engaged, he was struck by the hatch. There is no reasonable ground for claiming that Gray, by calling upon Holbrook to remove the hatches, intended that he should do so alone, or to exclude others, whom he had called there expressly to assist in the work, from co-operating with him. Holbrook and Torrey each understood that they were both required to remove the hatches, and would have co-operated but for the fortuitous presence of Rouse in the place where he stood. It was a usual and customary practice for men engaged in the work of removing hatches on shipboard to give notice

to persons below by calling out to them to stand from under, or similar words, importing a caution to such persons. This custom was known to all of the persons engaged in removing the hatches, and, as testified to by several witnesses in various parts of the vessel, was complied with on this occasion. Other witnesses, however, among whom was plaintiff's intestate, testified that they did not hear the caution. Assuming that this evidence presented a question of fact for the jury, and that it might properly find that no signal was given, yet the duty of giving the caution necessarily belonged to those engaged in executing the work, and not to the master. It pertained purely to the mode of execution, and rested upon those who were engaged in its performance and were well informed of the customary usage in respect thereto. It was no part of the duty of the master to remove hatches or direct the particular mode of doing so, any more than to direct workmen in the use of the tools with which they performed their work. There were customary and established modes of performing such services, and each employee was expected to do his work in the manner and style to which he was accustomed, without special directions in respect thereto. It was entirely immaterial whether the superintendent undertook to perform the work of removing hatches, or ordered it to be done by others; he was, in either case, engaged in performing the duty of a workman. The master had furnished abundant help to do the work, and had done all that was required of him, and it was the fault of the servants that a sufficient number did not co-operate to perform it safely, or do it in the manner prescribed by custom. It would be extending the liability of a master beyond any established rule to require him to oversee and supervise the executive detail of mechanical work carried on under his employment, and there is no rule of law which authorizes it. The risks arising to employees from the negligence and carelessness of fellow-workmen are incident to the service in all mechanical employments, and must be borne by the servant, and even with this limitation, the field of the master's liability is sufficiently broad to impose upon him most onerous obligations in the conduct of industrial enterprises. He is not the insurer of the lives and safety of those in his employ, and after he has performed the duties which the law enjoins upon him, is exempt from liability for injuries arising from accidents occurring in the ordinary and usual mode of prosecuting work.

The judgments of the courts below should be reversed, and a new trial ordered, with costs to abide the event.

WHEN SERVANT DOES NOT ASSUME RISK OF NEGLIGENCE OF FELLOW-SERVANT, and who are fellow-servants: *East Tennessee etc. R. R. Co. v. D'Armond*, 86 Tenn. 73; 6 Am. St. Rep. 816, and cases collected in note 820.

FELLOW-SERVANT IS ONE EMPLOYED ABOUT the same work with the servant injured, and whose negligence caused the injury to the servant complaining: *Krogg v. Atlanta etc. R. R. Co.*, 77 Ga. 202; 4 Am. St. Rep. 79, and see cases collected in note 84.

SULLIVAN v. TIOGA RAILWAY COMPANY.

[112 NEW YORK, 643.]

FELLOW-SERVANTS, WHO ARE — A COMMON MASTER IS ESSENTIAL TO THE RELATION OF FELLOW-SERVANTS. — If, therefore, the servant of one railroad company is injured by the negligence of those of another, he is entitled to recover of the latter, though both companies were entitled to use, and were using, the track and premises at which he was working when injured.

NEGLIGENCE — REFUSING TO SUBMIT TO SURGICAL OPERATION. — Where death has been occasioned by negligence, the administrator of the decedent cannot be precluded from recovering, as a matter of law, because he rejected the advice of his physician, and refused to submit his limb to amputation, when it appears that the question of whether the death was due to the rejection of such advice was properly submitted to the jury, and answered by their verdict in favor of the plaintiff.

ACTION by an administratrix to recover damages for the death of the decedent. Verdict and judgment for plaintiff.

D. C. Robinson, for the appellant.

Sylvester S. Taylor, for the respondent.

DANFORTH, J. Action to recover damages for injuries inflicted upon plaintiff's intestate through negligence of defendant's servants. The trial judge refused to nonsuit, and jury found for the plaintiff. Motion for a new trial was denied at special term, and from order there made, and from judgment entered upon verdict, an appeal was taken to general term, where both were affirmed: 44 Hun, 304. This appeal is against that decision.

The place of accident was the yard of the New York, Lake Erie, and Western Railroad Company, at Elmira. It contained, among others, a switch-track running at one point over an ash-pit to a turn-table. The intestate was a servant of that road as an ashman, and at the time in question was

at work in, or just leaving, the pit. The Tioga railroad was a terminal road, and had permission from the other company to use the track and turn-table for reversing its engines. It was doing so upon this occasion, in charge of its engineer and fireman, and at the pit its engine ran upon the intestate, causing, as the surgeon says, "a compound fracture of the fore leg." In about ten days afterwards, and before recovery from his hurt, he died. While in the yard, the defendant's engine was subject to the rules of the other company. These facts are not disputed. But the appellant contends, as it contended upon the trial: 1. That no negligence on its part was proven; 2. That the plaintiff's intestate contributed to the accident; 3. That the injury received did not cause death; and 4. That the persons in charge of the locomotive were fellow-servants of the decedent.

Upon the first and second propositions, the testimony was brought to the attention of the trial judge by motion for nonsuit, to the attention of the special term by motion for a new trial, and afterwards to the attention of the general term. It is not necessary to rehearse it. It has, however, been examined by us, in view of the appellant's contention, that in giving it effect these various tribunals were in error, and we easily find that the evidence in some reasonable view was sufficient to justify a conclusion that the persons in charge of the engine knew, or should have known, that the intestate was at the pit, and so exposed as to make collision probable, yet that they went upon him without warning or notice of any kind, under circumstances which, as interpreted by the charge, the jury characterized as negligent.

Upon the evidence, they were also justified in finding that the intestate had no knowledge of the approaching locomotive. He knew, of course, that the place he occupied was a place of danger, but it by no means follows that in taking the risk of his employment he contributed to an accident occasioned by circumstances in no way connected with it. Upon both points the verdict is conclusive. Nor were the persons in charge of defendant's engine—the engineer and fireman—in any sense his co-employees. The evidence fails to show that at the time of the accident he was in a common service, or engaged in a common employment with them. He was in the service of the New York, Lake Erie, and Western Railroad Company; they were in the service of the Tioga Railroad Company. Their negligence was not one of the risks which, by virtue of

his contract of service, he had taken upon himself. He was at no time under the authority of the defendant, nor in any respect its servant. He neither owed service to it, nor did he render it. On the other hand, neither the engineer nor fireman owed any duty to the New York, Lake Erie, and Western railway. It is true, that company owned the track, and the defendant used it upon necessary occasions. But the defendant, and so the defendant's servants in charge of its engine, used it as licensees, under such regulations as were imposed as conditions of use, not of service. The intestate was, in respect to his employment, a stranger to the defendant. He was merely at work in a yard to which, by permission of his employer, the defendant, by its servants, had access. He was removing ashes from the pit, they running an engine over a part of it to reach the turn-table; and the duties of each were so limited. Neither was responsible to the master of the other for the manner of performance. There was no common master; and although, having regard to the place of service, they were neighbors,—they were not co-servants. Each, therefore, is entitled to protection against the negligence of the other: *Smith v. New York etc. R. R. Co.*, 19 N. Y. 127; 75 Am. Dec. 305; *Svenson v. A. M. Steamship Co.*, 57 N. Y. 108.

It is next argued by the learned counsel for the appellant that the plaintiff should be deprived of her recovery, because the injured man at first rejected the advice of his physician, and refused to submit his leg to amputation. If the refusal was fatal to the patient, the defendant has no cause to complain, for death limits a verdict to a less sum than a jury might think proper to award to a living but crippled man. But the physician, in fact, gave no assurance that an operation would change the apprehended result. "It would," he testifies, "have improved the chances"; but he also said that within his own experience there had been cases where, against advice, and in the face of such objection, amputation had been omitted and the limb saved. It appears, therefore, that surgery is not an exact science, and even in its present advanced stage there is defective anatomy and misjudgment. It certainly cannot be said, as matter of law, that a patient may not, without imputation of negligence, trust to natural results, without the complications of scientific experiments. But this question was also properly submitted to the jury, and answered by their verdict in favor of the plaintiff. No other question is raised.

We think the appeal fails in every aspect, and that the judgment appealed from should be affirmed.

FELLOW-SERVANTS, WHO ARE: See *Hussey v. Cogger*, *ante*, p. 787, and note 793.

WHERE PATIENT CONTRIBUTES TO PRESENT SUFFERINGS AND PERMANENT INJURY, attributed to malpractice of a physician, by disregard of the latter's instructions, either personally or by those in charge of the patient, there can be no recovery in damages: *Potter v. Warner*, 91 Pa. St. 362; 36 Am. Rep. 558.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

GREGORY *v.* BUSH.

[64 MICHIGAN, 37.]

WATERS. — RAVINE OR GULLY WHICH IS SIMPLY OUTLET FOR SURFACE WATER at certain seasons of the year, having no defined bed or channel, with banks and sides, nor permanent source of supply, and no living or spring water ever coursing through it, cannot be termed a natural water-course, and is not therefore governed by the well-settled rules applying to natural streams.

EASEMENT MAY BE ACQUIRED BY PRESCRIPTION, BY WHICH the water collecting upon the lands of one person must be allowed to overflow the lands of an adjacent proprietor.

OWNER OF LAND HAS RIGHT, IN INTEREST OF GOOD HUSBANDRY, and in the improvement and tillage of his farm, in good faith, to fill up stagnant pools, sag-holes, and basins on his land, so that no water will accumulate or remain in them, even if the water arising from rain-fall or melting snows should thereby, in natural processes, find its way to the land of an adjoining owner, and incidentally increase the flow thereon; but he cannot, by artificial drains or ditches, collect the waters of such low places and cast them in a body upon the proprietor below, to his injury.

James A. Sweezey, for the complainant.

C. G. Holbrook, and Knappen and Van Arman, for the defendant.

MORSE, J. The parties to this suit are farmers in the township of Hastings, Barry County. Their farms are separated by a highway, running north and south, complainant's premises being on the east side, and defendant's land on the west side, thereof.

The complainant seeks to enjoin defendant from further digging and tiling any drains on his farm, by which the water

being or falling on his land will be conveyed to and upon the premises of complainant.

His bill alleges, in substance, that the premises owned and occupied by him are of the value of five thousand dollars; that the highway is his west boundary line; that south of his house and farm buildings there is a field of wheat of about fourteen acres, nine acres of which is lowland; that the land of said defendant, upon the opposite side of the highway, is above and on a higher plane than this lowland of complainant; that upon defendant's premises are several low places or sags, towards which the water from the rain-falls and melting snow runs naturally by surface descent; that all the water from rain and melting snow which falls upon at least eighty acres of land finds its way into said low places, some of which are more or less swampy; that the lands of said defendant, including these sags, are situated upon a higher grade than the lands and wheat-field of complainant; that in times of very high water some of the water falling and accumulating on defendant's premises runs over and under the highway and upon complainant's land, but that, ordinarily, no damage is or would be done, as the water passes off by evaporation and percolation in such a manner as not to injure the premises of complainant; that there is no natural channel or run for the water that falls from rain and accumulates from melting snow on defendant's premises from said premises to complainant's, and if any water finds its way across the highway from defendant's to complainant's premises, except in cases of great rains and very high water, it is only by the process of percolation through the soil, and in a manner so gradual and slow as to do no material damage to complainant; that there is no natural channel or outlet for the escape of the waters which fall upon complainant's premises, but that all the waters from rains and snow falling on said wheat-field pass away by evaporation and percolation; that defendant, at the time of the filing of the bill, was engaged in digging and tiling a drain from his lowlands and swampy places so as to convey such water on complainant's premises, and especially on his said fourteen-acre wheat-field, which will result in the destruction of the growing wheat and complainant's great injury; that defendant can as easily drain off his waters in another direction, without any damage to complainant's premises, and that defendant's action in the premises is taken for the purpose of willfully and maliciously injuring complainant.

Defendant's answer avers that he has lived on his farm for more than twenty years, during all of which time a ditch or drain has been maintained by him, running from his premises across the highway to the premises of complainant and his said wheat-field. This waterway existed before complainant owned or had possession of his said premises.

Complainant has helped to support, maintain, and keep said ditch in repair, and has laid stone along the highway to keep it open. Such ditch has never injured complainant's premises or caused him damage. The wheat-field is low and swampy land, of small value, and not productive. It was wild land when complainant purchased it, and in clearing it he burned off the surface to a depth of twelve or eighteen inches.

Defendant denies that he was constructing a drain when the suit was commenced, but admits that he had been laying tile in the channel of the ditch for the purpose of covering over the ditch. This tiling did not increase the quantity of water which would flow in the ditch, but improves the value and the appearance of defendant's land.

He also denies the allegation in the bill that his land can easily be drained in any other direction; and further denies any willful or malicious conduct or intention upon his part in the premises.

The answer, by a demurrer clause, makes the point that complainant has adequate remedy at law for any and all the grievances alleged in his bill.

The proofs in the cause were taken in open court, and the court below granted the relief asked, perpetually enjoining the defendant "from maintaining any ditches or drains by which the surface water from rains or snows falling upon the land of defendant will be conducted to and upon the land of complainant, or conducting such water by means of tile-drains and ditches to and upon said premises of said complainant."

The facts disclosed by the proofs, as we find them, are as follows: In a state of nature, the wheat-field or lowland of the complainant, which he avers was damaged by the drainage of defendant's premises, was a tamarack and whortleberry swamp, containing from seven to nine acres, and was the natural receptacle of the surface water from rains and melting snows accumulating upon the lands of the defendant, and running through a ravine or gully on defendant's premises, and across where the highway now is, to said swamp. It also received more or less surface water from the higher lands of

complainant. It is not easy of drainage, and water would stand upon it in the spring and fall, and during high-water times, to a depth of from two to five feet, and remain until it disappeared by percolation and evaporation.

Complainant commenced clearing up this swamp some twelve or thirteen years before the commencement of this suit. He tried to drain it, but has not been successful in such effort.

For twenty-five years and upwards there has been a sluice maintained in the highway, at the lower point of this ravine, for the water flowing therein to pass through upon the lands of complainant. It was there when he bought his farm, and he has acquiesced in it and helped to maintain it. The surface waters accumulating naturally upon defendant's land, and the natural overflow of the small sags or basins thereon, have always flowed through this culvert, and upon the land of complainant.

The flow of this water during these years has been accelerated somewhat by plowing a furrow at first in the ravine, and by an open drain with stone for the last ten years, without any serious complaint on the part of complainant, or any perceptible damage to his premises.

We do not think this ravine can be termed a natural watercourse. It is simply an outlet for surface water at certain seasons of the year. It has no defined bed or channel, with banks and sides. It has no permanent source of supply, and no living or spring water ever courses through it. It is therefore not governed by the well-settled rules applying to natural streams. No right can be claimed by defendant to run this water upon the land of complainant, or to drain his sag-holes into this ravine, because it is a watercourse. He must therefore be governed by the law relating to the flow and disposition of surface water, unless, by the long acquiescence of complainant, he has acquired an easement.

It was held in *Boyd v. Conklin*, 54 Mich. 583, 52 Am. Rep. 831, that, without regard to the law as to the flow of surface water, an easement might be acquired by prescription, by which the water collecting upon the land of one person must be allowed to overflow the lands of an adjacent proprietor. Under this holding we have no doubt of the right of defendant to discharge the surface water of his land through this ravine, where it ran naturally, and has been permitted to run for over twenty years by the complainant, and as it has so run for that

number of years. See also *Earl v. De Hart*, 12 N. J. Eq. 280; 72 Am. Dec. 395.

The question still remains as to the right of the defendant, by digging ditches or tiling drains, to empty out the sag-holes into this ravine and upon the lands of the complainant, to his damage.

The defendant would have the right, in the interest of good husbandry, and in the good-faith improvement and tillage of his farm, to fill up these sag-holes, so that no water would accumulate or stay in them, even if the water arising from rainfall or melting snows should thereby, in natural processes, find its way into this ravine and upon the land of complainant, and incidentally increase the flow thereon: *Cooley on Torts*, 577; *Washburn on Easements*, 3d ed., 454; *Goodale v. Tuttle*, 29 N. Y. 467; *Pettigrew v. Village of Evansville*, 25 Wis. 229; 3 Am. Rep. 50; *Hoyt v. Hudson*, 27 Wis. 656; 9 Am. Rep. 473; *Bangor v. Lansil*, 51 Me. 521; *Flagg v. Worcester*, 13 Gray, 601; *Livingston v. McDonald*, 21 Iowa, 160, 174; 89 Am. Dec. 563.

But he cannot, by artificial drains or ditches, collect the waters of stagnant pools, sag-holes, basins, or ponds upon his premises, and cast them in a body upon the proprietor below him, to his injury: *Cooley on Torts*, 580; *Livingston v. McDonald*, 21 Iowa, 160; 89 Am. Dec. 563; *Butler v. Peck*, 16 Ohio St. 334; 88 Am. Dec. 452; *Martin v. Riddle*, 26 Pa. St. 415; *Pettigrew v. Village of Evansville*, 25 Wis. 223, 227; 3 Am. Rep. 50.

The evidence shows but three sags or basins upon the land of defendant, the waters of which overflowed into the ravine. Before the land was cleared and cultivated, and while they were filled with logs, brush-wood, and bushes, they covered more space and held more water than afterwards. Clearing them out, and cultivating the land about them, has filled and dried them up to a more or less extent. But the three together are estimated by the most of the witnesses not to have contained more than from one to two acres in their greatest capacity. The water standing in them after the overflow had run off would average less than two feet in depth. One of these sags had been cleared, drained, and cultivated for twenty years before the commencement of this suit, and has always been kept dry by cultivation and the occasional turning of a furrow into the ravine. Crops have been raised upon

it every year. This is the low place spoken of by the witnesses as being opposite the log-house on complainant's land.

We do not think, under these facts, that the complainant can complain of the drainage of this spot by the defendant, in the natural and usual course of husbandry; and we cannot find, from the proofs, that such drainage has been of any perceptible damage to the premises of complainant.

The other sags are described as follows: A low springy or mucky place, west of the barn on defendant's land, being in extent about five or six rods long and three or four rods wide; and the other, a hole containing from one half acre to an acre of land, being two and one-tenth feet deep. It is admitted that the overflow of these basins naturally ran into the ravine.

From this sag west of the barn the ravine heretofore mentioned ran down to and upon the lowland of complainant. The other sag or hole was in a lateral direction from this main ravine; but a natural depression ran from it into the main gully, through which its overflow was emptied.

The defendant, at the time of the service of the temporary injunction in this suit, was digging out the ditch in the main ravine, and tiling it, as he claims, so that he could cover it and cultivate over it. He had also, before and about that time, deepened the outlets or ravines from these sags so as to carry out all the water in them. And this has been of some damage to complainant's land, and, if allowed to be persisted in, will be a continuing damage indefinitely. The evidence shows more water upon complainant's land, and that some water remains there longer than it did before it received the water held in these basins. Though the amount of damage may not be easily perceived or estimated, the natural consequence of opening these sags and letting upon this lowland of complainant their waters, which otherwise would have been retained upon defendant's premises until disappearance from evaporation and percolation, is to deposit upon the premises of complainant surface water of defendant which complainant in law is not bound to receive. Defendant cannot, even in the interest of good husbandry upon his farm, thus transfer the water of his cat-holes to the premises of his neighbor.

The law does not authorize one farmer, even for the purposes of cultivation and tillage of his premises, to dry up a pond on his place by depositing the waters thereof upon the premises of another, thereby making such other tract more

difficult to redeem. One has a right to ditch and drain and dispose of the surface water upon his land as he sees fit; but he is not authorized to injure, by so doing, the heritage of his neighbor. He cannot collect and concentrate such waters, and pour them through an artificial ditch in unusual quantities upon his adjacent proprietor: *Kauffman v. Griesemer*, 26 Pa. St. 407; *Barkley v. Wilcox*, 86 N. Y. 148; 40 Am. Rep. 519; *Noonan v. Albany*, 79 N. Y. 470; 35 Am. Rep. 540; *Adams v. Walker*, 34 Conn. 466; 91 Am. Dec. 742.

Since the complainant has undertaken to reclaim his lowland or swamp, grass and garden crops have been grown upon it, and, although the evidence tends to show that the soil has not the necessary constituents for growing good wheat, there is no doubt but it is capable of use and cultivation, which capability will increase with such use. He has a plain and equitable right to so use it, and is not required to hold it as a basin for any more of the surface water of defendant than would naturally flow through the ravine, to which flowage the defendant has gained an easement. The waters not naturally overflowing from the two sags must be held there by defendant, or disposed of in some way not to the injury of complainant.

But we think the injunction, as it now stands, is too broad.

The decree of the court below will be so modified as to perpetually enjoin the defendant from emptying the waters of these two sags, other than the natural overflow, by ditches, tiled drains, or otherwise, into this ravine and upon the lands of complainant.

We shall award no costs to either party in this court.

Complainant will recover costs in the court below.

NATURAL WATERCOURSE, definition of: Note to *Bloodgood v. Ayers*, 108 N. Y. 400; 2 Am. St. Rep. 447. Surface water flowing through a ravine ordinarily dry does not constitute a watercourse: *Lessard v. Strain*, 62 Wis. 112; 51 Am. Rep. 715.

EASEMENT. — If two tracts adjoin, the owner of the upper tract has a natural easement to have the water which falls upon his land flow off upon the lower tract: *Tatel v. Bonnefoy*, 123 Ill. 653; 5 Am. St. Rep. 570; *Boyn-ton v. Longley*, 19 Nev. 69; 3 Am. St. Rep. 781, and note 787. Where the owner of a tract of land makes one part of it servient to another, and then conveys one of the parts, his grantee takes such part benefited or burdened by the easement: *Kelly v. Dunning*, 43 N. J. Eq. 62. Where owner of two adjoining tracts constructs a water-ditch across one of the tracts for the purpose of irrigating the other, and while the ditch is so used conveys the respective tracts to different purchasers, the grantee of the tract for the irrigation of which the ditch was made acquires an easement in the other tract of the right to use and maintain such ditch: *Quinlan v. Noble*, 75 Cal. 250.

MYNNING v. DETROIT, LANSING, AND NORTHERN RAILROAD COMPANY.

[64 MICHIGAN, 93.]

PLEADING AND PRACTICE. — AS GENERAL PROPOSITION, IT IS RIGHT OF JURY TO JUDGE OF SUFFICIENCY of the evidence introduced to establish any one or more facts in the case upon trial; but when there is a total defect of evidence as to any essential fact, the case should be withdrawn from the consideration of the jury.

IT IS DUTY OF TRIAL JUDGE, WHEN REQUESTED, BEFORE SUBMISSION OF CASE TO JURY, to decide, as a preliminary question of law, whether there is any evidence on which the jury could properly find a verdict for the party on whom the burden of proof lies, and if there is not, he ought to withdraw the case from the jury.

ABSENCE OF CONTRIBUTORY NEGLIGENCE IS NOT NECESSARY TO BE SHOWN beyond cavil or question. If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff's fault, he is entitled to go to the jury upon the facts, the judge taking the case from the jury only when it is susceptible of but one just opinion.

RAILROAD TRACK ITSELF IS WARNING OF DANGER to all who go upon it, and a person about to cross is bound to look and listen, if by so doing he can discover the proximity of a moving train, and the omission to do so is an omission of ordinary care, which will prevent his recovering for an injury which might have been avoided if he had used his faculties of sight and hearing. Such conduct is of itself negligence.

PRESUMPTION OF LAW IS, THAT PERSON KILLED AT RAILROAD-CROSSING DID STOP and look and listen, and such presumption will prevail in the absence of direct testimony on the subject; but where there is affirmative, direct, and creditable testimony to the contrary, the presumption is rebutted and displaced.

CONTRIBUTORY NEGLIGENCE — ACCIDENT AT RAILROAD-CROSSING RESULTING IN DEATH. — Testimony that the deceased was a man possessed of ordinary faculties; that he was acquainted with a certain railroad-crossing; that on a dark and stormy evening he walked at a rapid pace towards and upon the crossing, without checking his speed, or stopping, or looking, or listening, or taking any precaution whatever to ascertain whether a train was about to pass; that others, who were about to cross, with no better opportunities for observation, saw and heard the train; that he stepped upon the crossing, and was struck and killed by the train, — shows such contributory negligence on the part of the deceased as prevents a recovery by his administrator, and the trial judge should have directed a verdict for the defendant.

Palmer and Palmer, and H. J. Hoyt, for the appellant.

Andrew Hanson, for the plaintiff.

CHAMPLIN, J. On the thirtieth day of October, 1882, as Phillip A. Myning was crossing a spur-track of the defendant, he was run over by a train of cars and killed. The accident occurred while he was walking along one of the public streets in the city of Big Rapids, between six and seven o'clock

in the evening. At this time it was quite dark. A rain-storm was approaching, with considerable wind from the southwest. The deceased was walking rapidly east, and the train was backing from the north.

This action is brought by the administrator of deceased to recover damages for the wrongful and negligent killing of Phillip A. Mynning. After averring the duty of the railroad company in the running and management of its trains at the point in question, the negligence claimed is set out in the following language, namely: —

“Running said locomotive engine, with a train of freight-cars attached, backward, and at a high and dangerous rate of speed, in the dark, without giving any signals by sounding the whistle or ringing the bell, and without having any light at or upon the rear end of said train of freight-cars attached to said locomotive engine, or any head-light upon said engine, to warn people who were crossing, or about to cross, said spur or side track of said defendant running over and crossing said Baldwin Street, of the approach of said locomotive engine, with a train of freight-cars attached, and so that the employees of said defendant upon said locomotive engine, and upon said train of freight-cars attached, who were operating and managing said locomotive engine and the said train of freight-cars attached, could see persons who were crossing, or about to cross, the said spur or side track of said defendant where the same crosses said Baldwin Street, by reason whereof the said Phillip A. Mynning, who was lawfully walking along said Baldwin Street at the point where said spur or side track crosses the same, and while he was in the exercise of due and proper care, and without fault or negligence on his part, was struck and run over by said freight-cars attached to said locomotive engine, so willfully, recklessly, wrongfully, and negligently run and operated by said defendant, as aforesaid, whereby and by reason whereof the said Phillip A. Mynning was then and there, to wit, at the city of Big Rapids, in said county of Mecosta, on the day and year aforesaid, struck by said freight-cars attached to said locomotive engine, and instantly killed.”

The testimony introduced upon the trial respecting the defendant's negligence was conflicting, and consequently, upon that point, was a proper question for the jury to determine. The main question in the case, however, turns upon whether the deceased was himself in the exercise of ordinary care at

the time of the accident, and whether he did not, by his own careless or negligent conduct, or by the neglect to exercise due care, contribute to the injury complained of.

After the testimony on behalf of the plaintiff was closed, the defendant orally demurred to the evidence, and moved the court to direct the jury to find a verdict for the defendant, on the ground that the plaintiff's evidence established affirmatively and conclusively that plaintiff's intestate was wanting in due care, and that his own negligence contributed to his death. The court declined to hear argument, and overruled the motion. The testimony subsequently introduced did not in any respect vary the probative force of that given upon this point when plaintiff closed his case. Defendant's counsel again requested the court to instruct the jury that, under the evidence in the case, the injured or deceased person was guilty of contributory negligence, and their verdict must be for the defendant.

The testimony is all returned in the bill of exceptions, and it is proper that this question should be considered first; for if the point is well taken, it virtually disposes of the case, and the other errors assigned become unimportant.

Counsel for plaintiff claims that it does not lie within the province of the trial judge to take the case from the jury, but that it is the privilege and right of the jury to judge of the sufficiency of the evidence introduced to establish any one or more facts in the case upon trial.

As a general proposition, this is true; but when there is a total defect of evidence as to any essential fact, the case should be withdrawn from the consideration of the jury: *Conely v. McDonald*, 40 Mich. 158. The motion made at the close of the plaintiff's proofs raised precisely this question: Whether, taking all the testimony introduced by plaintiff as true, and all legitimate inferences to be drawn therefrom, there was any evidence tending to prove that the deceased was in the exercise of ordinary care at the time of the accident; the defendant claiming that it affirmatively appeared from such testimony that the negligence of the deceased contributed to the accident which resulted in his death. This raised a question of law, which it was the duty of the trial judge to decide.

If, at the time the plaintiff closed his proofs, there was no evidence upon a material point in issue upon which the plaintiff had the burden of proof, or if it affirmatively appeared by

his own showing that he had no cause of action upon the undisputed testimony introduced by him, the defendant was entitled, at that stage of the case, to a direction from the court to the jury to find a verdict for the defendant. Equally so, under the same circumstances, was defendant entitled to such direction after all the evidence was introduced. It is the duty of the judge, when asked to do so, before submitting the case to the jury, as a preliminary question of law, to decide whether there is any evidence on which the jury could properly find a verdict for the party on whom the *onus* of proof lies; and if there is not, he ought to withdraw it from the jury: *Carver v. Detroit and Saline Plank Road Co.*, 61 Mich. 584.

The ruling of the court denying the motion, and refusing the request to charge, renders it necessary to examine fully the testimony introduced upon the trial, in order to determine whether error in law was committed by such ruling.

The Muskegon River runs nearly south through the city of Big Rapids. Baldwin Street runs east and west, and is connected on either side of the Muskegon River by a bridge. A mill-race leading from the river, north of Baldwin Street, crosses the street about 150 feet east from the bridge. The spur-track of the defendant extends, from a point south, to the mills along the race, and to the river above the mills, and at the point where it crosses Baldwin Street is between the race and river,—about fifty-five feet from the race, and ninety feet from the river.

On the night of the accident, there was a lamp at the east end of the bridge over Muskegon River, which was lighted. In approaching the railroad track from the west, there was nothing to obstruct the view north of Baldwin Street for a distance of about four hundred feet. The train had been made up north of Baldwin Street, and consisted of box-cars and flat-cars laden with lumber,—eleven in all. The deceased, at the time of the accident, resided about one mile east of the city, but had lived in the city, and was familiar with the railroad-crossing at Baldwin Street.

Three witnesses were introduced by plaintiff who saw the accident. Two of these, Mr. Wakeman and Mr. Trafford, were walking west on Baldwin Street. When they were upon the bridge which spans the mill-race, and about fifty-five feet from the crossing, they saw the train approaching from the north. They testified that a person with a lighted lantern

was upon the rear car, swinging the light as if signaling. The train was in rapid motion, and neither heard the sound of bell or whistle. They both saw Mr. Mynning approaching the crossing from the west. He was then about twenty or thirty feet from the crossing, walking rapidly, bent a little forward, as was natural to him, with his head down. He did not pause, or look to the left or right, but kept on, and stepped upon the crossing, and was struck by the rear car, and taken from their sight. The opportunity of these witnesses for observation was aided by the lamp which shone from the end of the bridge; the deceased being between them and the light. They were looking at him from the time they first saw him until he was struck by the train.

The other witness was John McLaughlin. He was walking east on Baldwin Street, and saw Mynning about seventy-five feet ahead of him, as he was crossing the bridge. As he came off of the bridge, Mynning was twenty-five to thirty feet from him, and he saw Mynning walk right in front of the train, and saw it strike him. He saw the train before it struck Mynning, and stopped. He testifies that Mynning did not stop on approaching the crossing; that he was looking at him, and did not see him look either way, but he walked pretty fast.

Thomas P. Mortenson did not see the accident, but was approaching the crossing on Baldwin Street, going east, when the train passed. He had a horse and buggy. When he came to the end of the bridge, his horse stopped, and he looked up, and saw the train crossing Baldwin Street. He saw a light upon the train, but thinks it was upon top of the middle car in the train. He did not see the deceased.

William Polson met Mynning between the bridge and the crossing. He says he spoke to Mynning, who was walking rapidly east; that he (witness) walked on west; and when he got close to the bridge, he heard a noise, and looked around, and saw the train passing Baldwin Street. He heard the pulling of the engine, and saw some kind of show-lights from the smoke-stack, and he gave it as his opinion that if he had been within five or ten feet from the railroad track, he could not have seen the train coming, or the light either, on account of the darkness, although he did not think it was too dark to have seen the light. On cross-examination, this witness testified that when he met Mynning, he was close to the railroad track, and about forty feet from the bridge; that he (witness)

went on towards the bridge, and was within ten or fifteen feet of it when he heard the train.

The testimony tended to show that Mynning was possessed of all his faculties; and there was no testimony given or claim made that he was not in full possession of the faculties of seeing and hearing. Neither of the above-named witnesses heard any sound of a whistle or the bell, and all concurred in the opinion that the train was moving across Baldwin Street at a high rate of speed.

I have given above substantially all the testimony tending to prove that the deceased was in the exercise of ordinary care. It shows conclusively, and without contradiction,—1. That the deceased was a man possessed of the ordinary faculties; 2. That he was acquainted with the railroad-crossing at Baldwin Street; 3. That, on a dark and stormy evening, he walked at a rapid pace towards and upon the railroad track crossing Baldwin Street, without checking his speed, or stopping, or looking, or listening, or taking any precaution whatever to ascertain whether a train was about to pass; 4. That others, who were about to cross, whose opportunities for observation were no better than those of deceased, saw and heard the train; 5. That he stepped upon the crossing, and was struck by the train, which ran over and killed him.

The rule with reference to contributory negligence was laid down by this court in the case of *Teipel v. Hilsendegen*, 44 Mich. 462, where it was said that “the absence of contributory negligence is not necessary to be shown beyond cavil or question. If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff’s fault, he is entitled to go to the jury upon the facts. The judge takes the case from the jury only when it is susceptible of but one just opinion.”

The jury having passed upon the conflicting testimony with reference to the defendant’s negligence in not giving warning by the sounding of the whistle or the ringing of the bell, and of the neglect, as alleged, to have a light upon the rear end of the train, by their verdict in plaintiff’s favor, the negligence of the defendant in those respects must be considered as established; and we have the case of the deceased approaching the railroad-crossing upon a dark and stormy night, without any other warning of danger than that afforded by the track itself, the existence of which he knew, and that it was used almost daily in passing engines and cars over it. Had he

taken the ordinary precaution upon approaching a railroad-crossing of looking or listening, in order to ascertain if the train was approaching, before stepping upon the track, it is evident, from the testimony of the witnesses who witnessed the catastrophe, that he would have seen or heard it. The testimony precludes the fact, or any inference to be drawn from the facts, that the deceased exercised any or the remotest degree of caution on that occasion. He passed along hurriedly, as if there was no railroad-crossing there. From the testimony, it is plain to me that the case is susceptible of but one just opinion upon his want of ordinary care. Ordinary care would have required him to at least look up and down the track before crossing; and if the night was so dark as to make it difficult to distinguish a train approaching, then ordinary care would have called upon him to resort to his sense of hearing, and to pause, if need be, and listen, before entering upon the place of danger.

As was said when this case was here before (59 Mich. 260): "The track itself is a warning of danger to those who go upon it, and persons about to cross a railroad track are bound to recognize the danger, and make use of the sense of hearing as well as of sight; and if either cannot be rendered available, the obligation to use the other is the stronger to ascertain, before attempting to cross it, whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly or carelessly upon the track, without any effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is of itself negligence."

In the former trial, it was not clear that the party did not look and listen, and we thought that, under the testimony there given, the case was properly submitted to the jury upon that point. Upon this trial it clearly appears that he did not look, nor is there any evidence which would justify the inference that he listened, for the approach of the train.

In the case of *McWilliams v. Detroit Central Mills Co.*, 31 Mich. 274, it was said that a passenger along the sidewalk of a public street has a right to expect some warning before any sudden backing of cars after standing still, and there should be very plain proof of negligence to bind him under such circumstances. But in that case the track was a private one, and it was pointed out that it stood on a different footing than an ordinary track. In that case, the plaintiff's intestate was struck with the cars and killed, while crossing a public street,

by the cars being backed up suddenly after standing still. No one saw the accident, and it was not known for more than an hour after it happened.

The presumption of law is, that the person killed at a crossing did stop, and look, and listen, and will prevail in the absence of direct testimony on the subject. But where there is affirmative, direct, and creditable testimony that the person injured went upon the track without stopping to look and listen, the presumption is rebutted and displaced: *Pennsylvania R. R. Co. v. Weber*, 76 Pa. St. 168; 18 Am. Rep. 407; *Reading & C. R. R. Co. v. Ritchie*, 102 Pa. St. 425; *Powell v. Missouri Pac. R'y Co.*, 8 Am. & Eng. R. R. Cas. 467; *Haas v. Grand Rapids & I. R. R. Co.*, 47 Mich. 401.

Such is the testimony in this case, and there is none to the contrary. The showing of contributory negligence is much stronger than in *Pzolla v. Mich. Cent. R. R. Co.*, 54 Mich. 273; and we held in that case that the plaintiff was not entitled to recover because of such contributory negligence, and we affirmed the ruling of the court below in taking the case from the jury. See also *Potter v. Flint & P. M. R. R. Co.*, 62 Id. 22.

Our conclusion is, from the whole testimony bearing upon the question of contributory negligence, that it affirmatively appears that the negligence of the deceased directly contributed to the accident which resulted in his death, and for that reason the circuit judge should have directed a verdict for the defendant.

We are referred to the case of *Beisiegel v. N. Y. Cent. R. R. Co.*, 34 N. Y. 622, 90 Am. Dec. 741, as holding that a foot-passenger on a public crossing has a right to expect some warning upon approaching the railroad track. In that case the plaintiff was nonsuited in the trial court on the ground of contributory negligence. There was evidence which tended to show that the engine was running at a high rate of speed across a thoroughfare in a city, without ringing the bell or sounding the whistle, and that plaintiff both looked and listened before attempting to cross. The nonsuit was set aside on the ground of the defendant's negligence, and that plaintiff was himself free from negligence. Another trial was had, and the case came before the court of appeals again, and is reported in 40 N. Y. 9, when the court was divided upon the question as to plaintiff's contributory negligence. James, J., said: "The plaintiff knew that trains were often passing at this crossing.

It was his duty, therefore, before starting to cross the track from his place of concealment, to have ascertained whether an approaching train or engine was coming, and within fifteen feet of the place where he stood. One step in advance, which would have been perfectly safe, and a look east, would have shown him the danger; and his omission of this easy, simple precaution, demanded of all persons before entering upon a railroad-crossing, was gross negligence contributing to the injury, and bars all right of action against the defendant, even though its agents or servants were also negligent."

But in *Grippen v. New York Cent. R. R. Co.*, 40 N. Y. 34, it was held that if the injured party, by looking up the track in the direction of the approaching train, could have seen it in time to avoid the injury, his omission to do so was negligence, and the refusal of the court thus to instruct the jury was error. This case, in some of its facts, was similar to the case at bar. The accident happened upon a stormy, snowing night. The defendant's servants were engaged in depositing cars to be unloaded, and in picking up empty freight-cars, and were moving a train of six cars backwards along the railroad track, called the South Branch. The plaintiff was familiar with the crossing, and drove a horse and cutter across the railroad track without stopping to look or listen. Woodruff, J., said: "These same considerations, applicable to the conduct of the railroad company or its agents, are alike applicable to the conduct of persons who are liable to be injured. All the circumstances which render it more than usually difficult for them to see or avoid a train are so many reasons why they should be more vigilant and cautious on their part, and, instead of forming an excuse for omitting to use greater caution, impose it upon them with greater strictness."

And see, upon this point, *Harty v. Central R. R. Co.*, 42 N. Y. 468; *Gorton v. Erie R'y Co.*, 45 Id. 660; *McGrath v. New York Cent. & H. R. R. Co.*, 59 Id. 468; 17 Am. Rep. 359.

In the case last above cited, Mr. Justice Andrews said: "In respect to a person traveling in a highway which is crossed by a railway, it has been settled, by a series of adjudications in this state, that he is bound, on approaching a crossing, to look and listen, if by so doing he can discover the proximity of a moving train, and that the omission to do so is an omission of ordinary care, which will prevent his recovering for an injury which might have been avoided if he had used his faculties of sight and hearing."

And again: "His duty to keep his faculties alert, and look and listen, does not at all depend upon the fact whether the railroad company does or does not perform its duty in giving the statutory signals."

The decisions in New York are in accord with those in this state, and is the established doctrine of all courts where the principles of comparative negligence do not obtain.

The judgment must be reversed, and a new trial ordered.

NEGLIGENCE, CONTRIBUTORY, when a question of fact for the jury, and when a question of law for the court: Note to *City R'y Co. v. Lee*, 7 Am. St. Rep. 802. Where there is no dispute as to facts, the question is purely one of law: *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736; but where the testimony is conflicting, the jury must decide under the instructions of the court: *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736; *Nichols v. Sixth Avenue R. R. Co.*, 38 N. Y. 131; 97 Am. Dec. 780; *Pettingill v. Porter*, 8 Allen, 1; 85 Am. Dec. 671; *Indianapolis etc. R'y Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578, and note; *Glascocock v. Central etc. R'y Co.*, 73 Cal. 137.

COURT MUST EXPOUND THE LAW, AND THE JURY decide the facts: *McCarry v. King*, 3 Humph. 267; 39 Am. Dec. 165; *Beaman v. Russell*, 20 Vt. 205; 49 Am. Dec. 775; *Gray v. Allen*, 14 Ohio, 58; 45 Am. Dec. 523; *Kesten v. Hilderbrand*, 9 B. Mon. 72; 48 Am. Dec. 416. Where a scroll affixed to a bond is questioned as not being a seal, it is a question for the court; but whether there was a scroll or not, and who placed it there, are questions for the jury: *Baird v. Reynolds*, 99 N. C. 469. The jury are the judges of the sufficiency and weight of evidence, and of the credibility of witnesses, but when plaintiff makes out an uncontradicted case, jury have no right to disregard the evidence: *Levy v. Cox*, 22 Fla. 546. The jury are the sole judges of credibility of witnesses and the weight of the testimony: *Glover v. State*, 22 Id. 493. General rule is, that court must construe written instruments and contracts; but where an instrument between one of the parties to the suit and a third party is collaterally in evidence, the effect of which depends not merely upon its construction, but upon extrinsic facts and circumstances, the inferences to be drawn are facts for the jury, not of law: *Rosewater v. Hoffman*, 24 Neb. 222.

ORDINARY PRUDENCE IS REQUIRED OF TRAVELER about to cross railroad track: *O'Connor v. Missouri P. R'y Co.*, 94 Mo. 150; 4 Am. St. Rep. 364, and note 368. As to what is negligence in one crossing a track, see notes to 97 Am. Dec. 100; 100 Id. 781; *Moebus v. Herrmann*, 108 N. Y. 349; 2 Am. St. Rep. 440, and note 443. The duty imposed upon one at the crossing of a highway by a railway to look both ways does not, as a matter of law, attach to one about to cross a city street: *Moebus v. Herrmann*, 108 N. Y. 349; 2 Am. St. Rep. 440. Where intestate, with his carriage-top up, approached defendant's railway-crossing, slowing his horse to a walk, when near it, at a point where track was straight, at twenty-five yards from it, and up to it, he had a view of it for miles, but until his horse was on the track he did not look out for the train, and then attempted to hurry his horse across, in front of the train, he was guilty of contributory negligence: *New York etc. R'y Co. v. Kellum's Admr.*, 83 Va. 851. Where a team drawing a loaded wagon was seen by engineer of an approaching train to be coming on an up-grade toward a public

crossing at a point where trains could not be seen more than nine hundred feet, the engineer signaled, etc., and the driver, familiar with the crossing, was lying asleep upon the wagon, but not visible to engineer, who supposed him walking behind, and the team not halting, engineer tried to stop train, but without avail, facts did not make case of negligence of railway, or of willful injury: *Indiana etc. R. R. Co. v. Wheeler*, 115 Ind. 253. The duty of one about to cross a railroad-crossing requires him to look and listen for an approaching train, and greater care is required where view of track is partially obstructed: *Atchison etc. R. R. Co. v. Townsend*, 39 Kan. 115. A person of mature age, in full possession of his faculties, while driving along a public road approaching a railroad-crossing, from which road a clear view of track could be had for a considerable distance, is guilty of contributory negligence in driving across without first looking for approaching trains, and under such circumstances railroad company is not liable, although engineer failed to give the proper signals: *Glascock v. Central etc. R'y Co.*, 73 Cal. 137. If one who is injured by a passing train while upon a railroad track went upon it under such circumstances as to render him guilty of negligence, the railroad company will not be liable for failure of its servants who are operating the train, to discover his position in time to avoid the injury: *Galveston etc. R. R. Co. v. Ryon*, 70 Tex. 56.

CHANDLER v. CAREY.

[64 MICHIGAN, 237.]

PROMISSORY NOTE, WHAT IS NOT — CONTRACTS. — INSTRUMENT IN WRITING, WHEREBY ONE PARTY AGREES to pay a certain sum of money on or before a given date to another party, upon the completion by the latter of certain work agreed to be performed for the former, is not a promissory note, and no recovery can be had upon the instrument without proof of performance of the work named therein.

Milo D. Campbell, for the appellants.

Frank L. Skeels, for the plaintiff.

MORSE, J. Chandler sued the Careys in justice's court. He declared orally in *assumpsit* upon the following instrument as a promissory note:—

"\$119.00.

"For value received, we jointly or severally promise to pay Alonzo Heath, or bearer, one hundred nineteen dollars, on or before the first day of October next, upon completion of the work to be done by said Heath on a dwelling-house to be built by him for said first parties.

"ABBEY J. CAREY.

D. W. CAREY."

"February 7, 1884.

The defendants pleaded the general issue, and gave notice of set-off and recoupment.

Upon the trial in that court, the plaintiff testified that he owned the note, and purchased it before due, and paid value for it, and offered the instrument in evidence.

The defendants undertook to show a conversation with Heath, the payee named in the note, but were not permitted to do so.

No further evidence was offered or introduced by either party, and the justice rendered judgment for the plaintiff for the sum of \$123.16, and costs.

The plaintiffs in error then sued out a writ of *certiorari* to the circuit court, which court affirmed the judgment of the justice. The case is brought here upon writ of error.

The judgment should be reversed.

The instrument sued upon is not a promissory note, but a simple contract to pay a certain sum of money when certain work is performed by Heath: *Brooks v. Hargreaves*, 21 Mich. 254. There was no evidence that Heath had done the work named in the agreement, and therefore no liability was shown upon the part of the Careys to pay the sum specified in the contract.

The judgment of the circuit and justice's courts must be reversed, and judgment entered here for the plaintiffs in error for the costs of all the courts.

PROMISSORY NOTE. — Essential qualities of a note: *Cook v. Satterlee*, 6 Cow. 108; 16 Am. Dec. 432, and note to 14 Id. 421-427.

PROMISSORY NOTE — *What is:* *Lowe v. Bliss*, 24 Ill. 168; 76 Am. Dec. 742; *Read v. McNulty*, 12 Rich. 445; 78 Am. Dec. 467; *Caples v. Branham*, 20 Mo. 244; 64 Am. Dec. 183; *Fralick v. Norton*, 2 Mich. 130; 55 Am. Dec. 56; *Pool v. McCrary*, 1 Ga. 319; 44 Am. Dec. 655.

What is not: *Patterson v. Poindexter*, 6 Watts & S. 227; 40 Am. Dec. 554; *Worden v. Dodge*, 4 Denio, 159; 47 Am. Dec. 247; *Kelley v. Hemmingway*, 13 Ill. 604; 56 Am. Dec. 474. An instrument in the form of an ordinary promissory note containing also promise "to pay an additional sum of ten per cent as attorney's fee," etc., is not a promissory note: *First National Bank v. Gay*, 73 Mo. 33; 21 Am. Rep. 430. An instrument in these words: "Grass Valley, July 8, 1882. \$1,000. Three years from date, I promise to pay to D. S., for value received, in United States gold coin, at rate of ten per cent per annual," and signed by makers, is a good promissory note: *Strickland v. Holbrooke*, 75 Cal. 268. A written instrument in form of promissory note, but under seal, is not a promissory note: *Muse v. Dantzier*, 85 Ala. 359.

COOK v. CLINTON.

[64 MICHIGAN, 309.]

ADVERSE POSSESSION — CO-TENACY. — Where occupant of land under tax titles becomes entitled to a part of the land by a conveyance of the original title to such part by an heir, a presumption arises that he is a tenant in common with the other owners of the original title, and that he ceases to be an adverse holder thereafter; but such presumption may be overcome by evidence that the original possession was continual with the intention to exclude the other owners from any right or interest in the land, and the question may be properly submitted to the jury.

ADVERSE POSSESSION. — All adverse possession must be open, notorious, continuous, exclusive, visible, and distinct, as well as adverse. There must be an actual occupancy, as distinguished from a constructive possession, of a part or the whole of the property claimed.

PLEADING AND PRACTICE. — ERROR CANNOT BE ASSIGNED BY PLAINTIFF on account of the withdrawal by the defendant of special questions submitted to the jury, where such withdrawal could work no prejudice to the plaintiff.

EJECTMENT.

Norris and Uhl, for the appellant.

Taggart and Denison, for the defendant.

SHERWOOD, J. This case was an action of ejectment to recover the undivided seven-eighths part of forty acres of land lying in the county of Kent.

The defendant claimed by adverse possession under tax titles, and one eighth under the original title.

The cause was tried in the Kent circuit, before Judge Montgomery, by jury, and the defendant prevailed. The plaintiff brings error. Ten errors are assigned; two only relate to the admission of testimony. One of these was to the introduction in evidence of the deed from Jacob W. Winsor to John French, dated June 1, 1868, and the other was to the admission of the record of the patent from the state of Michigan to Nathaniel Newberry. There was no error in admitting these conveyances, and those assignments were abandoned on the hearing.

Nathaniel Newberry bought of the state, about the year 1847, the land in question, and received a patent therefor. He died in 1849, leaving eight children, one of whom (Phœbe Jane) was a minor.

One of the children, named Nathaniel Newberry, Jr., on the first day of January, 1851, mortgaged the land in question, with other parcels, to the plaintiff; and on June 16, 1851, the widow and other children, except the minor, quit-

claimed their interest in the mortgaged premises to Nathaniel Newberry, Jr., who died in January, 1853, leaving one child, a daughter.

The sale under the mortgage foreclosure occurred on the twenty-second day of April, 1853, and is the only source of plaintiff's title, the property never having been redeemed from the sale.

The daughter of Nathaniel Newberry, Jr., married Francis M. Bissell.

There is no question of the right and title of the defendant to the one eighth of the property.

The property in question was sold for the taxes of 1853 to J. W. Winsor, and deeded. J. W. Winsor sold the same to George W. Hooker, and deeded it October 2, 1858. Hooker sold and conveyed the property to Jacob W. Winsor on the twenty-eighth day of February, 1859. The land was again sold by the auditor-general to Zenas G. Winsor for taxes of 1857, and deeded January 12, 1860.

Jacob W. Winsor and Zenas G. Winsor quitclaimed the property to Jackson French on the eighteenth day of October, 1860. French and wife quitclaimed the premises to Asa B. Gilbert, John J. Lacey, and V. M. Hamilton, on the twelfth day of March, 1861. Asa Gilbert died previous to February, 1866, and Mary E. Van Valkenburg was his widow.

February 28, 1866, John J. Lacey and wife and Mary E. Van Valkenburg quitclaimed the property to Charlotte French. Jacob W. Winsor quitclaimed the premises on the first day of June, 1868, to John French, and John French and Charlotte French, his wife, conveyed the same to Matilda Clinton, on the twenty-fourth day of June, 1870. Matilda Clinton died, leaving Frank Clinton, the defendant, her only surviving child, in possession of the property.

Phœbe Jane, on July 11, 1868, long after she had become of age, and had married a Mr. Sherman, conveyed her individual one eighth of the lands in controversy to Mary A. Bissell; and Mary A. Bissell, September 2, 1868, conveyed the same to Francis M. Bissell; and Francis M. Bissell quitclaimed the said land to Matilda Clinton, subject to tax titles, November 4, 1872, and before Matilda died.

The foregoing conveyances, ending with Matilda Clinton, and all of which were duly recorded, show the chain of paper title under which the defendant and his grantors took possession of the property, and have continued the same, and under

which and his tax titles he claims to be entitled to the property in suit.

In considering the question of possession under defendant's titles, and whether or not it was adverse, their validity is of no particular consequence.

The defendant claimed continuous adverse possession of the property in himself and his grantors from the date of the deed to J. W. Winsor, in 1853, down to the time of the commencement of this suit, in 1884, and gave testimony tending to show such possession. The possession thus claimed, and its character, was controverted by the testimony offered by the plaintiff. A part of the plaintiff's testimony upon this subject was the deeds from Phœbe Jane to Mary A Bissell, and from Mary A. Bissell to Francis M. Bissell, and from Francis M. Bissell to Matilda Clinton. It was claimed by the plaintiff that Mrs. Clinton's purchase of the Bissell title constituted her a tenant in common of the property, it conveying to her the original title to one eighth of the property, and that she could not be an adverse holder thereafter.

The circuit judge, in his charge, held that *prima facie* this was true, but that the *prima facie* case upon this point might be overcome by evidence that the possession Mrs. Clinton then had she continued under the claim of an exclusive right, and with the intention to exclude the plaintiff from any right or interest therein; that such possession, even though against a co-tenant or tenant in common, was adverse, and, upon the evidence, submitted this question, with the other facts in the case, to the jury; and to this portion of the charge counsel for plaintiff excepted.

We see no error in this charge. The plaintiff knew of the hostile character of Mrs. Clinton's possession. There may be some question, where the party does not go into possession under the conveyance which creates the co-tenancy, whether such conveyance should be presumed to destroy an adverse holding then existing. Be this as it may, certainly the charge was within the previous decisions of this court: *Dubois v. Campau*, 28 Mich. 304; *Campau v. Dubois*, 39 Id. 274; *Sands v. Davis*, 40 Id. 14; *Campau v. Campau*, 44 Id. 31; *Knowles v. Brown*, 69 Iowa, 11.

The court charged the jury: "The defense is, that this title of the plaintiff has been wholly divested by the adverse possession, continued for the statutory period. All adverse possession must be open, notorious, continuous, exclusive, visible,

and distinct, as well as adverse. Now, what is meant by this is, that there must be an actual occupancy, as distinguished from a constructive possession, of the property; that is, some one must be in actual possession of the property. Not necessarily living upon the property; if the property is inclosed and cultivated, this would be a sufficient actual occupancy; and if crops were continually growing upon the premises, this would be a visible occupancy; and even though in the *interim* between the harvesting of a crop and the recropping of the land the succeeding spring no person was actually upon the premises, and nothing done with them, yet, if year after year the land was thus cropped and cultivated, this would be a sufficiently continuous possession within the meaning of the term as I have given it to you. So a possession is sufficiently notorious if it is open and visible, and the premises are actually occupied, so that the people passing to and fro past the premises may see these visible evidences of occupation. This would make it notorious among those familiar with the premises. It is distinct when it is clearly defined. And in this case I instruct you that if the defendant in this case went into possession of these premises described in the deed of conveyance under which he claims, that deed would define the extent of his occupancy. It would not be necessary for him to occupy each acre of the premises. If he occupied some portion of it, that would be a distinct occupancy of the whole, as defined by the deed under which he entered into possession. The claim must be hostile to the plaintiff."

After thus defining and explaining what kind of possession is necessary to become adverse, the circuit judge, among other things, charged the jury as contained in the following paragraphs, and to each of which counsel for the plaintiff excepted:—

"1. Adverse possession of the character which I have defined, for a period of fifteen years, gives a complete title in this state, and defeats the record title of one claiming from the government. And if the defendant has held adverse possession, such as I have defined, for the period of ten years, under or through the so-called Winsor tax title, the action would be barred, and the plaintiff cannot recover in this action; and this would be true if only a portion of the Winsor title was vested in him.

"2. In stating this period of occupancy, gentlemen, I mean to state, and to be understood as stating, that that period of

occupancy must have been for the period of fifteen years, or ten years, respectively, prior to the eleventh day of February, 1884. That is the date of the commencement of this suit; and, of course, the adverse possession must have been sufficient prior to the date of this suit to defeat the plaintiff's action, or he would be entitled to recover under the instructions I have given you.

"3. You will observe that the sole question for you to determine in this case is, whether there has been this adverse possession of the character which I have defined, adverse to the plaintiff, since the parties became co-tenants, as well as before, and continued for a period of fifteen years; or if you find that the defendant held under a tax title, — the Winsor tax title, so called, — whether such possession as I have defined, and so adverse to the plaintiff, has continued for a period of ten years prior to the commencement of this suit, on the eleventh day of February, 1884. If you find either of these questions in the affirmative, your verdict must be for the defendant; if you find them in the negative, both of them, your verdict must be for the plaintiff.

"4. I further instruct you, if the defendant held adversely and in adverse possession of the premises, within the meaning of that term as I have defined it to you in my charge, which I will not here repeat, for ten years, under or through the so-called Winsor tax title, that the action would be barred by the plaintiff, and the plaintiff would not be entitled to recover, and that this would be true if only a portion of the Winsor title was vested in the defendant; if he went in under a tax title, and held under a tax title, and there was such an adverse possession as I have defined to you was requisite to constitute the adverse possession, and that continued ten years under that tax title, that this would vest the title in the defendant, and the plaintiff could not recover."

We see nothing objectionable in these four paragraphs of the charge. They state the law correctly as applied to the facts of this case as they appear upon the record: *Howell's Comp. Stats.*, sec. 8698; *Yelverton v. Steele*, 40 Mich. 538; *Hamblin v. Warner*, 30 Id. 95; *Perkins v. Nugent*, 45 Id. 156; *Sparrow v. Hovey*, 44 Id. 63; *Campau v. Lafferty*, 43 Id. 429; *Bower v. Earl*, 18 Id. 367.

The withdrawal of the special requests to find could work no prejudice to the plaintiff. He did not present them, or ask them to be given, and made no objection to their withdrawal.

The record shows the attorney for the plaintiff was not present when the withdrawal was made, but it does not show that his absence was from any fault of the court or the defendant. Really, all the facts asked to be found were submitted in the general charge, and the case was one proper to be submitted to the jury.

We have now noted all the assignments needing consideration in this opinion. We have found no error in the record.

The judgment must be affirmed.

ADVERSE POSSESSION must be actual, visible, continuous, notorious, distinct, hostile, and exclusive: *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71; *Denham v. Holean*, 26 Ga. 82; 71 Am. Dec. 198; *Worcester v. Lord*, 56 Me. 265; 96 Am. Dec. 456, and note; *Schwallback v. Chicago etc. R. R. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740, and note 744; *Lewis v. Schwenn*, 93 Mo. 26; 3 Am. St. Rep. 511; *Sherin v. Brackett*, 36 Minn. 152.

ADVERSE POSSESSION. — If one unlawfully taking possession of land afterwards becomes tenant in common, his possession at once loses its hostile character, and the presumption is, that it remains amicable till the contrary is shown: *Carpenter v. Mendenhall*, 28 Cal. 484; 87 Am. Dec. 135. Compare *Warfield v. Lindell*, 38 Mo. 561; 90 Am. Dec. 443. One co-tenant cannot make his possession adverse to other tenants in common except by actual ouster: *Page v. Branch*, 99 N. C. 97.

STANTON v. HITCHCOCK.

[64 MICHIGAN, 316.]

HOMESTEADS. — OBJECT OF MICHIGAN CONSTITUTIONAL PROVISION FOR HOMESTEAD is to protect that dwelling which has been the actual home of the family from such disturbance as will make them lose its enjoyment. It is confined, by its language, to the property actually occupied as a homestead by a resident of the state, and if the owner has a family, it is the actual home of that family which is protected against creditors.

HOMESTEADS. — THERE IS NOTHING IN MICHIGAN HOMESTEAD ACT WHICH CONTEMPLATES that a wife who has never lived on the premises, or claimed to live there, may, after her husband's death, claim such an interest by relation as will avoid his dealings with property which he never meant should be the home of the absentee, however much he may have wronged her. The provisions of the act are confined expressly to resident widows.

WHERE WIFE HAS ONCE HAD HER HOME WITH HER HUSBAND in his dwelling, he cannot deprive her of that vested right by driving her out.

CHARACTER OF ANY PROPERTY AS HOMESTEAD DEPENDS ON INTENTION, and it may be entirely destroyed by a removal of residence, after which the property stands liable to sale or other disposal by the owner at his pleasure.

HOMESTEAD, CONVEYANCE OF BY HUSBAND WITHOUT SIGNATURE OF NON-RESIDENT WIFE.—A married man went to Michigan, leaving behind him, in New York, his wife and two minor children, she expecting to join him in the new home, but never did. He bought a lot and built a house thereon, and about two years after his arrival remarried, without a divorce from his first wife. The second wife married him in good faith, supposing him to be single, and lived with him as his wife on said premises till his death, prior to which he conveyed the property to her. None of the first family ever lived in Michigan, except that a son, aged then about eighteen, came and was received as a member of his father's new household, until dismissed for ill-treating the children of the second wife; and the husband never made or proposed to make the property a home for the common occupancy of himself and first wife, but it was intended for and actually occupied by the second wife and family, and so continued till the husband's death. Under this state of facts, the land never became the homestead of the first wife, and the husband's deed to the second wife was not void for want of her signature.

EJECTMENT.

Lemuel Clute, for the appellant.

Wilson and Trowbridge, for the plaintiffs.

CAMPBELL, C. J. In this case, the controlling facts found are these: In 1873, Thomas J. Hitchcock came to Michigan, leaving behind him, in New York, a wife, Caroline Hitchcock, and two minor children. The wife knew of his coming, and expected at some time to join him, but was never in Michigan. In March, 1875, Hitchcock bought a vacant lot, and subsequently built on it. Whether he began to build or not before his second marriage does not appear, but the house was finished thereafter. In December, 1875, he, without divorce from his previous wife, married defendant, who married him in good faith, supposing him to be single. After the house was built, they moved into the house, and had children, who, with the parents, lived in it as their home till he died, when the second wife became owner by conveyance from Hitchcock, unless void by reason of the claims of the former wife to a homestead interest in it. None of the first family ever lived in the house, except that a son, aged then about eighteen, came and was received as a member of the household, until dismissed for ill-treating the children of the second wife.

It appears from the finding that the first wife never lived in Michigan, and of course never lived in the house; that Hitchcock never made or proposed to make it a home for their common occupancy; that it was intended for and actually occupied by the second wife and family, and so always continued

The question then is, whether it ever became the first wife's homestead. That is the only question. That Hitchcock was guilty of wrong is clear enough. But whether the fact of his wrong-doing changes the character of the occupancy of the house is quite another question, which must be decided as a question of fact, and not as one of propriety. The inquiry is not what he ought to have done, but what he did.

The object of the constitution is not ambiguous. It is to protect that dwelling which has been the actual home of the family from such disturbance as will make them lose its enjoyment. It is confined, by its language, to the property actually occupied as a homestead by a resident of Michigan; and if the owner has a family, it is the actual home of that family which is protected from seizure by creditors. There is nothing in the statute which contemplates that a wife who has never lived on the premises, or claimed to live there, may, after her husband's death, claim such an interest by relation as will avoid his dealings with property which he never meant should be the home of the absentee, however much he may have wronged her. The statute which, after a husband's death, secures rights to a widow is, confined expressly to resident widows.

Under our legal regulations, no imaginary or imputed intention can supplant the actual intent. It would be little short of absurdity to hold that Hitchcock could at the same time contemplate the occupancy of the house as the home of his second wife and also of the first. This is not pretended by any one. It appears expressly that it was the actual and continued home of the second wife and family, and that all the domestic arrangements and purposes were with this in view. The first wife never contemplated it as her and her husband's joint home, and would, no doubt, have repudiated any such idea. After this marriage the first wife had no purpose of living with him at all. She never looked upon or used or sought it as a home, and never got the homestead rights of a surviving widow in it. The only right now set up is the right to have the disposition of it made by the husband avoided for want of her signature.

We have held, and I think rightly, that, where a wife has once had her home with her husband in his dwelling, he cannot deprive her of that vested right by driving her out. But here the home interest never vested. The law was made to protect actual homes, and not mere possibilities,—still less

to change by theory into a home that which is actually the reverse. In the present instance, the second wife was made so in good faith, and had some natural equities in the premises which would not probably have been legally recognized without the conveyance. But if the case had been worse, and the house occupied by the husband in a life of shame and indecency, it would, I think, be a very singular rule of law which would protect it as a homestead, and treat it as a home, and especially the home of the absent wife. The occupancy is one which she actually repudiated, and which, in the absence of any showing, she would be presumed to repudiate, and she could not decently do otherwise. But to hold it to have been her home in the eye of the law, when she purposely and very properly determined to reside elsewhere, is not, I think, to carry out the great and worthy purposes of the homestead laws.

It must be remembered, not only that the character of any property as a homestead depends on intention, but that it may be entirely destroyed by a removal of residence. There is nothing in the law to prevent such removal at any time, and after it the property stands, like any other property, liable to sale or any other disposal by the owner at his pleasure. Under our laws, the sale by a husband whose wife is non-resident carries the property free from any right of dower. Actual non-residence in such case, in spite of the marital relation, cuts off any control over the sale of a complete title. There is as much reason for the confinement of the homestead law. Marital rights are mutual. The state of Michigan, had Hitchcock never married defendant, could not have aided him in compelling his wife to join him, or exercised any control whatever over the persons or conduct of the absent children. It might divorce the parties for the wife's desertion, but it could not regulate their family relations while not divorced. Until divorced, if the first wife could, in the present instance, prevent the sale of the house, she could just as well do so while actually doing all she could to make a family home impossible. Her merits in the one case, or demerits on the other, would not count at all in the decision. The law would be grossly tyrannical if it tied the husband's hands in the one case at least, and it cannot be possible that such consequences could have been designed by the constitution. It was designed to protect those who had subjected themselves to its laws, and acted in reliance on them, but not to treat as homes

what are not homes, or give powers to non-residents which could not, under any circumstances, be of any use to them personally.

I think the judgment should have been given for the defendant, and that it should be reversed, and so entered, and the record remanded.

CHAMPLIN, J., in a dissenting opinion, maintained that "the fact that the defendant was imposed upon in her marriage with Hitchcock, and contracted that relation in good faith, believing him to be a single man, must be laid entirely out of view in the case"; that "her rights must be determined by the same legal principles that would be applied had Hitchcock conveyed the premises in question to a third party in no manner connected with him, and the contest was between such third party and the plaintiffs"; and that "the defendant did not occupy the position of a *bona fide* defendant." He was of opinion that the homestead right of Caroline Hitchcock "accrued to her in virtue of the ownership and occupancy of her husband of the premises as a homestead, and did not depend necessarily upon her living with him upon the premises"; that "such right accrued to her the moment the homestead right became vested in her husband, and long before she knew or was informed of his illegal marriage with the defendant, and during which time she was willing to come and reside with her husband in Michigan"; that "she had done nothing to forfeit such right, and that the deed in question was void, since a deed of the homestead in which the wife does not join is absolutely void as to such homestead." He examined the case of *Sherrid v. Southwick*, 43 Mich. 515, in which the husband gave a mortgage covering the homestead, in which his wife did not join, and it was held that the mortgage was absolutely void. He maintained that no distinction in principle existed between that case and the one at bar, and that the latter was governed by it.

HOMESTEAD STATUTES ARE LIBERALLY CONSTRUED: *Riggs v. Sterling*, 60 Mich. 643; 1 Am. St. Rep. 554, and note.

HOMESTEAD CHARACTER DOES NOT ATTACH to property until actually occupied as a home, and mere intention to occupy, though subsequently carried out, is not sufficient: *Christy v. Dyer*, 14 Iowa, 438; 81 Am. Dec. 493.

HOMESTEAD, TO A VALID CONVEYANCE OF, joinder, consent, and signature of wife are requisite: *Smith v. Pearce*, 85 Ala. 264; 7 Am. St. Rep. 44; *Poole v. Gerrard*, 6 Cal. 71; 65 Am. Dec. 481, and note 484; *Welch v. Rice*, 31 Tex. 688; 98 Am. Dec. 556; *Simpson v. Houston*, 97 N. C. 344; 2 Am. St. Rep. 297; *Pilcher v. Atchison etc. R'y Co.*, 38 Kan. 516; 5 Am. St. Rep. 770; Rev. Stats. of Missouri, 1879, sec. 2689; *Kaes v. Grass*, 92 Mo. 647; 1 Am. St. Rep. 767; *Brewer v. Wall*, 23 Tex. 585; 76 Am. Dec. 76; *Larson v. Reynolds*, 13 Iowa, 579; 81 Am. Dec. 444; *Burnap v. Cook*, 16 Iowa, 149; 85 Am. Dec. 507.

WIDOW, NON-RESIDENT, RIGHTS OF IN HOMESTEAD: Note to *Succession of Christie*, 96 Am. Dec. 412-418.

SPIEGEL v. SPIEGEL.

[64 MICHIGAN, 345.]

HOMESTEAD. — WIFE WHO IS INDUCED BY FRAUDULENT CONDUCT on the part of her husband to sign a deed conveying their homestead is entitled, in a court of equity, to have such deed set aside, and to be restored to her rights.

John W. McGrath and Alexander D. Fowler, for the complainant.

Hamilton G. Howard, for the defendants.

SHERWOOD, J. The bill in this case is filed for the purpose of requiring the defendant Dorothea Spiegel to convey to William J. Spiegel lot 13, in Dr. Kiefer's resubdivision of Van Dyke's section 2 of the A. Beaubien farm, between Beaubien and St. Antoine streets, in the city of Detroit, and asks that the deeds from said William J. Spiegel and wife to defendant Oldekopff, and from him and wife to Dorothea Spiegel, of the same property, may be decreed void, and that an injunction issue restraining the said Dorothea Spiegel from mortgaging or otherwise conveying to others, or exercising any acts of ownership over said lot.

The bill charges that defendant William J. Spiegel and complainant were, on March 4, 1885, man and wife; that William J. Spiegel was the owner of a house and lot on Montcalm Street, Detroit, which was his homestead, and in which Clara had inchoate dower; that on the 4th of March, 1885, William, by misrepresentation and fraud, induced Clara to join with him in a deed of this property to defendant George Oldekopff; that within a few days thereafter, Oldekopff and wife conveyed the property to defendant Dorothea Spiegel, who is the mother of William J. Spiegel; that the conveyances were without consideration, and operated as a fraud upon complainant; that both George Oldekopff and Dorothea Spiegel were parties to the fraud; and prays that these deeds may be set aside, and complainant's rights restored.

The answer admits the conveyances, denies the fraud, and claims that there was a good consideration in each instance.

Among the witnesses sworn were the complainant, and defendants Dorothea Spiegel and George Oldekopff. The defendant William J. Spiegel was not sworn. The cause was heard in the Wayne circuit, before Judge Jennison, who dismissed the complainant's bill, with costs.

The defendant William J. Spiegel was a widower, with three children, one an infant, one four, and the oldest seven years old, when, on December 2, 1884, he married the complainant, who lived at that time in her father's house, at 194 Leland Street, Detroit, where she was married. He owned, as his homestead, lot 13, hereinbefore described, but which at that time was rented out until the next April. He also owned city lot 71, of Hibbard and Baker's subdivision of lot 4, etc., in Detroit. After their marriage they resided temporarily at the homestead of the wife's father, in the city, expecting to return to their homestead on lot 13 when the tenant's term expired. They lived, with the children, in her father's house until about the 4th of March, 1885, using a part of their furniture where they lived, and the remainder remaining at the house of his father. William J. Spiegel's homestead was situated on Montcalm Street.

During the winter the wife was in poor health, and William complained much of the poor outfit her father gave her, and of the great expense the wife and children were bringing upon him; that it cost him five dollars per week to support his wife and three children, and in all his complaints it appears that he had much sympathy from his mother, who occasionally gave some very unpleasant expressions of her feelings upon the subject. The testimony in the case shows that, as early as February, he was found making such complaints as above, saying he could not live with her, and intended to make an effort at an early day to obtain a divorce.

His property, so far as the record shows, aside from household goods, consisted of the two lots mentioned, one being the homestead, worth at least three thousand five hundred dollars; and, I think, with a view, as the evidence clearly shows, of divesting his wife of all her interest in said property preparatory to taking divorce proceedings, he transferred to his mother, through the agency of Mr. Oldekopff, an old friend of the family, the homestead, and obtained the signature of his wife thereto, under the false pretense that he wanted to get away from the locality of his mother, because she made him so much trouble, and buy a homestead on Fourteenth Street, which was not worth so much, and would do so, and would use the rest of his money to go into business with, and that he then had a good opportunity to sell the property to Oldekopff, who would pay in ten days for the same. At the same time he obtained her name to a deed to his father, without knowing

what it was until after she had signed it, conveying the other lot.

These conveyances were both signed on the same occasion, on the fourth day of March, 1885, and in five days thereafter Oldekopff and wife conveyed the property to Dorothea, the mother of William. Oldekopff says he gave to William his note, due in ten days, for the property, and that when he sold it to Dorothea it was for the same price he agreed to pay for it, and received his pay from Dorothea by taking back his own note, and that Dorothea substituted her note to William for the same amount, due in five years, with interest at five per cent per annum. This business, the testimony shows, was consummated on the thirteenth day of March, 1885, and on the next day, Dorothea's deed was duly recorded. It nowhere appears that either Oldekopff or Dorothea paid a dollar in money for the property.

On the 14th, William told his wife that it was her fault that he had to sell his property, and wanted her to go to her home on a visit; that he was going to Ann Arbor to play for the students (he was a musician, and when in the city earned from three dollars to five dollars per night). On the 15th, he directed his wife to take the children to his mother's, and on that day he met his father-in-law; told him that his wife needed too much money; that she wanted five dollars per week; that he had just got through having trouble with his first wife, she being sick, and that he had the same trouble again, and he was not satisfied; denied that his property had been purchased by his mother. He told his wife he had got his money from Oldekopff on his note, and had left it at Stoll's, the man who drew the deed, and had taken his bank-book away for fear it would burn up; that he was going to board with his mother, and when she said to him she did not want to go there, said he did not care, he should go there, and she could go "where she liked." She then went to William's mother's, and asked her if they were going to board there; and Mrs. Spiegel replied, "No," but she would keep the children; and she then told the wife of William that she had bought the homestead, and said, "William is going backwards instead of forwards." On that night William packed up his house furniture. The next day he went to Ann Arbor, and on his return in the evening, said to his wife, she should not go with him "any more." The complainant commenced this suit the same day.

Thus it will be seen that, within four days after William's mother received the title of the homestead, he had abandoned his home, packed up his goods, and took his children to his mother's to live, made her house his abiding-place, and discarded his wife. After a careful reading of this record, and giving to all the circumstances and testimony bearing upon the questions at issue due consideration, I cannot avoid the conclusion that a gross fraud was attempted by William with the intention to deprive his wife of her homestead and dower interest in said lot 13, and that such purpose was within the knowledge of the other defendants.

I quite agree with the learned counsel for the complainant that "the transaction was fraudulent in its inception and in its execution, and that it has resulted in a fraud upon the complainant," greatly to her injury. Very much of the complainant's testimony is uncontradicted, and the other testimony in the case, and the circumstances disclosed, are of the most convincing character, and are not limited to inferences and presumptions not rising to the plane of evidence. I have not quoted the testimony to any great extent, but have contented myself rather in giving herein the conclusions I have reached on a review of the case as presented by the record.

I think the decree at the circuit should be reversed, and a decree entered in this court in accordance with the prayer of the bill, with costs of both courts.

HOMESTEAD CANNOT BE AFFECTED BY ANY SPECIES OF COMPULSORY DISPOSITION, nor can it be voluntarily disposed of without the assent of wife, but with her consent may be disposed of or encumbered in any mode deemed judicious or advisable: *Sampson v. Williamson*, 6 Tex. 102; 55 Am. Dec. 762; and note to *Stanton v. Hitchcock*, ante, p. 821.

HOMESTEAD IS NOT SEPARATE PROPERTY OF WIFE; she has no property in it: *Sampson v. Williamson*, 6 Tex. 102; 55 Am. Dec. 762.

BREITENBACH v. TROWBRIDGE.

[64 MICHIGAN, 393.]

PERSON HAS LICENSE TO ENTER PUBLIC OFFICE OF ANOTHER to transact business with the latter, who may refuse to transact business with him, and may order him from the office, and eject him in a reasonable manner, if he refuses to go, using sufficient force to meet any offered resistance.

IF ONE IS FORBIDDEN TO ENTER OFFICE OF ANOTHER, he is a trespasser if he persists in entering.

PERSON HAS RIGHT, IN HIS PRIVATE BUSINESS, TO CONTROL IT, and may select such persons as he chooses with whom to transact it, and can prevent whom he pleases from entering his office; and when a person, under implied license, has entered, he may request him to depart, and thereafter he has no legal right to remain.

PERSON'S PRIVATE BUSINESS OFFICE CANNOT BE MADE, against his will, free to all to enter and remain, even upon proper business, and such person can admit or reject whom he pleases. It is his own business, and the public have no rights therein against his wishes.

IN CIVIL ACTION FOR DAMAGES FOR ASSAULT AND BATTERY, ADMISSIONS, MADE by the defendant in conversation with the police justice before whom he was tried on the same charge, are admissible in evidence, but what the police justice said to him is incompetent.

IN ACTION FOR RECOVERY OF DAMAGES FOR BEING EJECTED FROM OFFICE OF DEFENDANT, where the plaintiff went to tender money due him, evidence of a prior offer of the money to an agent of the defendant, and that he refused it and sent the plaintiff to the defendant, is a legitimate part of the transaction, and the agent's statements are admissible in evidence.

EVIDENCE IS ADMISSIBLE, IN CIVIL ACTION FOR ASSAULT AND BATTERY, that the defendant called the plaintiff a "d——d police-court shyster," on the former's trial on a criminal charge arising out of the same transaction, as showing the *animus* of the defendant towards the plaintiff, but is incompetent for the purpose of showing malice at the time of the assault.

TRESPASS.

George W. Radford, for the appellant.

B. T. Prentiss, for the plaintiff.

MORSE, J. Plaintiff sued defendant in the Wayne circuit court, in an action of trespass for an assault and battery, and recovered a judgment for three hundred dollars upon the verdict of a jury for that sum. The defendant brings the case to this court, and assigns various errors in the proceedings in the court below.

The assault took place in the business office of the defendant, where the plaintiff had gone to pay or tender to defendant the interest then due on a land contract. The plaintiff was accompanied by one Mullenhagen, and there was also present one Schmiel, a clerk in the office of defendant.

The evidence upon the trial was conflicting. The testimony on the part of the plaintiff was to the effect that he, as counsel for Mullenhagen, went with the latter to the office of the defendant on the third day of November, 1885, about ten o'clock in the forenoon. He directed Mullenhagen to pay Trowbridge twenty-one dollars on his contract, and Mullenhagen commenced counting out the money. Trowbridge said he would

not take the money; it must be paid to his attorney, Mr. Radford. Plaintiff then said to Mullenhagen, "Let's go." While plaintiff was going out, with his face to the door, Trowbridge jumped at him from behind, took him by the collar, put his fist in plaintiff's back, and pushed him into the middle of the street. He was not in the office over two minutes.

On plaintiff's way out, and before the assault, he admits he heard the defendant halloo: "I want you to get out of my office," but at the time claims he was going as fast as he could. The humiliation of plaintiff, who is an attorney at law, was so great on account of this assault that he "felt sick and mean," owing to the "suffering and mortification" he endured. He had never been struck before, and never struck any one in his life.

The defendant claimed that he had before that time become displeased with the conduct of plaintiff in a garnishee case, where he thought plaintiff undertook to "beat" him, and then told him that he wanted no more to do with him; that did not want him in his office, and if plaintiff had any business with him of any kind thereafter, he must go to defendant's attorney, Radford; "did n't want anything to do with him at all."

On the day of the assault, he claims that he repeatedly told plaintiff to go to his attorney, as he would not receive the money. Finally, plaintiff said: "We are going to make you take it," and told Mullenhagen to lay the money down, which the latter did, upon a small counter in the office. Defendant said: "There is no use of laying it there; I will not take the money up." Mullenhagen took it up, and plaintiff ordered him to put it down again.

"And they laid it down again, and kept worrying me in that way; and finally I told them to get out, and Mr. Breitenbach said he would not go out until he had his business done. I told him his business was done with me, and to get out, and he did n't make any move to go. I slipped down off the stool behind the counter, and walked to the door, and told him to get out. I opened the door, and told him to go. He did n't make any particular haste to get out, and I took him by the collar and by the slack of the overcoat in the back and pushed him outside the door."

It appears without dispute that, previous to this meeting at defendant's office, the plaintiff and Mullenhagen had been to Radford to pay this money; but he refused to take it, and sent

them to defendant. Plaintiff so informed defendant at the time of the trouble, and defendant replied: "Do you suppose, after you have been to see Radford, and he will not take the money, that I will?"

Under the two conflicting claims as to what took place before the assault, we think the court erred in instructing the jury that "the plaintiff had the right to go to the office and do his business, and remain there until his business was done."

He further said, in the same direction: "Now, gentlemen, if you believe that Mr. Breitenbach had completed his business there, he had no right to remain there any longer than was necessary to transact his lawful business, because that is the only right he had there, unless he was invited to remain. Defendant then had the right, after his business was through, to say to him that he did not wish him there, and to leave."

It does not seem to be claimed that any more force was used in pushing him than was necessary, if defendant's statement of plaintiff's refusal to go was true.

If plaintiff's story was true, he was going out of the office as fast as he could before he was ordered to do so, and the assault was unprovoked. Under his own theory, he had completed all he intended to do there, and was on his way out, of his own accord, before the assault. There was no need of any charge of this kind to support his theory, and it could not be applied to the facts as testified to in his behalf. It could only apply to the facts as stated by the defendant, and so applied, it was wrong and misleading.

The plaintiff had a right to go into the office of the defendant, and, in a respectful way, make his tender; but after he had made it, and it had been refused, he had no further business there. He had no right to "make" defendant take the money; and when he was ordered to go out of the office, and refused to go, the defendant was justified in ejecting him, if he used no more force than was necessary. He could not, upon the plea that his business was not completed, remain and annoy the defendant. He could not help his right to be there by saying that he would not go out until his business was done.

He had a license to enter the office of defendant, not being a private place, for the purposes of transacting his business with the defendant. Yet the defendant had a right, if he saw fit, not to do any business with him, and to order him from the office, which belonged to the defendant, and was only pub-

lic for the purposes of transacting his own business. If the plaintiff did not go in a reasonable time, or refused to go, insisting upon remaining and transacting business with the defendant against his expressed will, the defendant was authorized, as before said, to eject him in a reasonable manner, and with sufficient force to meet any resistance offered. The license to enter, implied by the opening of defendant's office to the public to transact business with him, was revoked at the instant when the defendant said to plaintiff that he would not receive the money, and ordered him to leave the office: *Woodman v. Howell*, 45 Ill. 367; 92 Am. Dec. 221; *Jones v. Jones*, 71 Id. 562; *Wood v. Leadbitter*, 13 Mees. & W. 838; *McCrea v. Marsh*, 12 Gray, 211; 71 Am. Dec. 745; *Ayres v. Birtch*, 35 Mich. 501.

A person has the right, in his private business, to control it, and may select such persons as he chooses with whom to transact such business. He can prevent whom he pleases from entering his office; and when a person, under the implied license, has entered, he has a right to request such person to depart, who thereafter has no legal right to remain.

A person in such business has the choosing of his customers, and his private office or business place, though open to the public for the transaction of his business with them, cannot be made, against his will, free to all to enter and remain upon proper business, like a hotel, public office, railroad-car, or depot. He can admit or reject whom he pleases. It is his own business, and the public have no rights therein against his wishes: *Woodman v. Howell*, 45 Ill. 367, 370; 92 Am. Dec. 221; *Bogert v. Haight*, 20 Barb. 251.

In this case, if the defendant's testimony was true, he had before this forbidden the plaintiff to come into his office, and he was therefore, in such case, a trespasser when he went in. It was not necessary, for the purposes of a tender by Mullenhagen, that plaintiff should force himself into the office of defendant; nor after the money had once been laid down upon the counter and refused, that the same process should be gone over again. The case stood like this: If the story of the plaintiff was believed by the jury, the defendant committed an unjustifiable assault, and was liable in damages; on the other hand, if they gave credence to defendant's testimony, he did no more than he had a right to do, and was entitled to a verdict.

The charge as given could have no other effect than to mis-

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lead the jury, and was wrong in the abstract, as well as in its application to the facts in the case at bar.

The court also erred in permitting testimony to be given in relation to what took place in Justice Miner's court upon the trial there of a criminal action growing out of the same transaction. It was proper to give all that the defendant said there by the way of admission; but what Justice Miner said to him was incompetent, and had a manifest tendency to prejudice the jury.

There was no error in permitting plaintiff and Mullenhagen to testify that, before calling at defendant's office, they had been to Radford, his attorney, and offered him the money, and that Radford refused the same, and sent them to defendant. It was a legitimate part of the transaction; and Radford being the admitted agent of defendant in the matter of this land contract, his statements to them were properly received.

Defendant was asked, on cross-examination, if, on coming out of the police-court after the trial there, he did not call the plaintiff a "d——d police-court shyster." This was objected to as incompetent and immaterial, but the court permitted the question to be answered. This evidence would be admissible, I think, for the purpose of showing the bias and *animus* of the defendant towards the plaintiff, and therefore having a bearing upon his credibility as a witness. But plaintiff's counsel claims it was competent for the purpose of showing malice at the time of the assault, and therefore having a tendency to show that he used more force than was necessary to eject plaintiff from his office. I do not think it could be used for that purpose. It would not be fair to the defendant to use this remark made in the heat and passion following his arrest and trial in the police court, for the purpose of showing or inferring malice and ill-will at the time of the assault.

The judgment is reversed, with costs, and a new trial granted.

TRESPASS. — CIRCUMSTANCES ATTENDING COMMISSION OF A TRESPASS, though not set forth in the declaration, may be given in evidence with a view of affecting the damages, except where such circumstances in themselves constitute an independent cause of action: *Louisville etc. R. R. Co. v. Ballard*, 85 Ky. 307; 7 Am. St. Rep. 600. Circumstances accompanying a trespass, and giving character to it, may always be shown, either in aggravation or mitigation of damages: *Meagher v. Driscoll*, 99 Mass. 281; 96 Am.

Dec. 759; *Sutherland v. Ingalls*, 63 Mich. 620; 6 Am. St. Rep. 332, and note.

TRESPASS. — One has no right to go upon premises of another after owner has forbidden him to do so; nor has he the right after having entered by permission to remain after request to depart, even though such premises are a business office or mercantile house, workshop, factory, or other place of business. No doubt the fact that professional man, merchant, or other person opens office to transact business with and for the public is a tacit invitation to all persons having business with him, and a permission for such persons to enter, unless forbidden; but this rule does not divest the owner of control over his office or the right to prevent whom he pleases from entering, and to require all persons to depart after they have once entered: *Woodman v. Howell*, 45 Ill. 367; 92 Am. Dec. 221. ♡

TRESPASS. — One who enters house with permission, but remains after request to depart, is a trespasser *ab initio*: *Adams v. Freeman*, 12 Johns. 408; 7 Am. Dec. 327. *Contra*, *Wendell v. Johnson*, 8 N. H. 220; 29 Am. Dec. 648.

HANOLD v. KAYS.

[64 MICHIGAN, 439.]

PRINCIPAL AND SURETY. — SURETY ON PROMISSORY NOTES WHO AGREES TO PAY THEM as his own, and does so, in consideration of the conveyance to him by the maker of certain land encumbered by an unrecorded mortgage, of which the surety had no actual notice until after such payment, thereby assumes a new legal obligation, the payment of the notes before notice of the encumbrancer's equities forming a sufficient consideration for the deed.

DISCHARGE OF PRE-EXISTING DEBT IS AS GOOD CONSIDERATION for the transfer of a negotiable instrument as the payment of money, or the delivery of any other species of property.

HOLDER OF MORTGAGE GIVEN FOR PRECEDENT DEBT is a purchaser for value.

Annable and Fitch, for the complainant.

Spafford Tryon, for defendant Kays.

MORSE, J. This is a suit in equity to rectify a mistake made in the draughting of a mortgage as to the description of the premises, and to foreclose the same upon the land intended to be conveyed therein.

The facts as to the inception of the mortgage are undisputed.

The defendant George W. Owen, on the twenty-third day of June, 1883, borrowed six hundred dollars of the complainant. He and his wife gave their note for said sum, payable in one year, with interest at eight per cent, and secured the same by a real-estate mortgage executed and delivered the same day.

The land was known as the "Lensenmayer forty," and the parties went to one C. G. George, a conveyancer, and requested him to draught a mortgage for six hundred dollars from the Owens to Hanold upon the Lensenmayer forty.

They did not give him the description of the land, but he obtained the same from a map in his possession.

He made a mistake, describing the premises as located on section 11, when they were in fact on section 17.

Neither complainant nor defendants knew of this mistake for a long time, and the mortgage was recorded as drawn.

Kays is made a defendant because of a warranty deed of the land in question, executed and delivered to him by the Owens, September 2, 1884.

Complainant claims,—1. That Kays, at the time of taking his deed, had notice of the mortgage to complainant, and that the real intent of the parties to the same was, that the mortgage should be a lien upon the Lensenmayer forty; 2. That the only consideration for the said conveyance to Kays was an antecedent liability from said George W. Owen to said Kays, which was only contingent in its nature.

Kays defended on the ground that he purchased the premises for a valuable consideration, and without notice of the rights of complainant in the same. Owen and wife did not defend. The court below adjudged that Kays was not a *bona fide* purchaser for value, and granted the relief asked by complainant.

We find the facts in relation to Kays's deed to be as follows: The defendant George W. Owen was a country merchant, engaged in business for many years at Keelersville, in the county of Van Buren. Kays was a farmer living in the neighborhood, and trading more or less at Owen's store. He was also an indorser or surety upon three or four notes of Owen to different parties. At or about the time of the making of this deed, Owen had been sued in the circuit court for the county of Van Buren by a creditor, and a judgment of over thirteen hundred dollars rendered against him on the first day of September, 1884. The next morning early he came to the house of Kays, and said to him that he could not put off the collection of this judgment; and, as Kays and one John Roosevelt had always accommodated him, he wanted to fix up their matters at once. He asked Kays to pay two notes, one to Bock and one to Hill, upon which notes Kays was holden as surety, and he would turn him out property to pay him for so

doing; said he did not wish to turn out his homestead, but would pay him in any other property he had. Kays asked him what he had, to which Owen replied that he had some village property, a saw-mill, lumber, and logs, and his timbered lot (the Lensenmayer forty).

He asked Kays to go at once to Decatur, and "fix the business right up." Kays preferred to go to Paw Paw, and thereupon they drove to the residence of John Rosevelt, who hitched up his double team and went with them to Paw Paw. Rosevelt was also surety upon notes for Owen, and upon arriving at Paw Paw, he and Kays sought out O. N. Hilton, an attorney at law, and at that time judge of probate, and told him that they had a matter to fix up with Owen, and wished to complete it that day. Owen soon came into the office, and the matter was arranged. Kays told Owen that he did not wish to take the mill, lumber, and logs, as that was out of his line of business, but he would take the Lensenmayer forty. According to the testimony of Judge Hilton, who is corroborated by Kays and Rosevelt, Kays asked Owen if the title was all right. Rosevelt then said: "The title is all right, for I have looked it up myself."

Hilton then asked Owen if any execution had been levied upon it, knowing of the judgment taken the day before. Owen said he thought it was all right, but finally, upon Hilton's advice, Hilton and Kays went into the clerk's and register's offices, and found the title clear of record.

When they came back, Owen said: "Now, I will tell you what I would like to have you do. I would like to have you arrange this so that if I can pay for it in a year I can have the land back."

Mr. Kays replied: "I had just as soon do that as not. All I want is my money, and I will sign a paper agreeing to deed it back to you at the end of that time on your paying me back one thousand dollars."

Judge Hilton then drew an article, which Kays signed, providing that upon payment by Owen to Kays of one thousand dollars within a year from the date, the premises described as having been deeded by Owen to Kays, of the same date, should be deeded back to Owen. Hilton then stated to the parties that this instrument would convert the deed into a mortgage, and advised against the making of it. Kays then stated that he did not want a mortgage on the land, and the instrument

was destroyed. A deed of the premises from Owen and wife to Kays was then drawn, and read over to Owen, who signed it.

The deed was taken to Owen's house the same day, and there executed by the wife, in the presence of her husband, Kays, and John and Charles Rosevelt. The notes claimed to form a consideration for this deed were afterwards paid by Kays. They amounted to about one thousand dollars, and were so called and reckoned in the transaction. The land was worth from eight hundred to twelve hundred dollars.

The burden of proof was upon the complainant to show that Kays had notice of his unrecorded lien upon the premises. We are not satisfied that Kays had any such notice. On the contrary, the preponderance of evidence is decidedly in favor of his claim that he had no notice, and received the deed in good faith.

The testimony of George W. Owen is relied upon to prove notice. Without going into detail as to our reasons, we are not inclined to put any reliance upon his evidence, as it is full of such flat contradictions of himself that the truth in it, if any, is not clearly discernible. He testifies that he informed Judge Hilton, in the presence of Kays, of the existence of the complainant's mortgage, and that it ought to be mentioned in the deed, and that conveyance made subject to it, and Hilton replied it would make no difference. This is denied by Kays, Rosevelt, and Judge Hilton, and is not reasonable. He had offered to turn out to Kays the mill property, which was unencumbered; but Kays preferred to take the land in question.

If the deed was to have been subject to this mortgage, the payment could not have amounted to over three hundred dollars, and Kays would not have been likely to have put aside the mill property, worth the amount of his liability upon the Bock and Hill notes, and voluntarily accept this land, thus encumbered, in lieu thereof.

Another witness swears that upon a certain day, the date of which he well remembers, coming from Hartford towards Keeler on foot, he overtook Kays and his hired man, who each had a load of lumber. He got on and rode with Kays a few miles. He claims he had a conversation with Kays about some trouble the witness had experienced with Owen, and in the talk, told Kays that Hanold had loaned Owen some money, for which Owen had given a mortgage upon this land. This, he claimed, was on the fifteenth day of December, 1883, and

he fixed the time by a note that he paid off that day, and remembered it because he paid it the day it was due, and no interest was charged him.

There seems to have been no particular reason why he should have given this information to Kays, and the evidence has a suspicious look, to say the least. Kays denies any such talk, and both he and his hired man swear that the witness Struble never rode upon a load of lumber with Kays, and, furthermore, that neither of them drew any lumber that day.

Hanold, the complainant, also testifies that on the fifth day of July, 1883, he drove along the road by Kays's house, his errand being to get one Ruble, who was working for Kays, to doctor a sick horse for him. He found Ruble and Kays out by a shop that stood at the side of the road. George Kays, a son of the defendant, was also present. Hanold claims that Kays got to talking with him about his sick colt, and during the conversation, Hanold asked him if he owed Owen some eight hundred or nine hundred dollars. Kays said he thought not. Hanold told him that he had so heard and understood from Owen, and that was the reason he asked the question, as he (Hanold) had let Owen have some money,—six hundred dollars. Kays then asked him what security he had, and Hanold replied he had a mortgage on the Lensenmayer forty. Kays then said: "You are all right, then."

This conversation is denied by Kays, and also by Ruble and George Kays, who were in a position to have heard it had it occurred.

It is also questioned by the subsequent conduct of Hanold, about which there is no dispute. On the day of the presidential election in 1884, Hanold accosted Kays in the hall where the election was being held in their township, and asked him if he would not pay the mortgage. Kays said "No"; he had a clear warranty deed of the land. Hanold told him that Owen said Kays would pay the mortgage if waited upon for a while, but Kays said he would not pay it. Nothing was said in this conversation about any previous talk about this mortgage, or any notice that Kays had of its existence. After the commencement of this suit, Hanold and Kays had another conversation, in the store of Franklin Hill. Kays said to Hanold: "They have served the papers on me in regard to that mortgage. I think you have commenced on the wrong man." Hanold replied: "I don't know about that." Mr. Kays then said: "Mr. Hanold, I never knew you had a

mortgage on that piece of land until election day, when you told me." Hanold said he thought it very strange; that he supposed every man in town knew it.

In this conversation, Hanold did not claim that he had ever notified Kays of the mortgage previous to the execution of his deed, as he would have been apt to have done had it been true that he told him of it in July, 1883.

Franklin Hill, and another person who heard the conversation, also testify that, in the winter of 1884 and 1885, Hill asked Owen, in Hill's store, if he had ever told Kays that Hanold had a mortgage upon the Lensenmayer forty, and Owen replied that he did not know as he ever had, and that he could not swear that Kays knew there was a mortgage upon it.

There is no other evidence in the case having any tendency to prove any knowledge on the part of Kays of the existence of the Hanold mortgage on the 2d of September, 1884; nor is there anything in the proofs showing any collusion upon the part of Kays with Owen to defraud the creditors of the latter, outside of Owen's evidence, which we regard as worthless.

The evidence establishes the fact that Kays paid the notes to Bock and Hill, as he agreed to, and he thereby became a purchaser for value of the land.

He relinquished his rights as a surety upon said notes, and agreed absolutely to pay them as his own, thereby expressly assuming a new legal obligation. He did pay them before notice of complainant's equities. This payment formed a sufficient consideration for the deed.

The taking of this land in payment of a precedent debt from Owen to Kays would not, as claimed by complainant, in this state, prevent Kays from being regarded as a purchaser for value. This deed was not taken as security, as in the case of *Boxheimer v. Gunn*, 24 Mich. 372, but as an absolute conveyance, for which Kays agreed to pay, and did pay, two notes upon which Owen was primarily liable, thus discharging Owen from the debt. But if the notes had been payable by Owen to Kays, and therefore evidencing a precedent debt, a surrender of the notes to Owen by Kays, or a cancellation or destruction of them, would nevertheless have furnished a sufficient consideration for the deed. The doctrine that the extinguishment of a pre-existing debt is not a valid and sufficient consideration for the transfer of a negotiable instrument, was repudiated in *Bostwick v. Dodge*, 1 Doug. (Mich.) 413, 41 Am. Dec. 584; and it has ever since prevailed in our state that such discharge of

a precedent indebtedness is as good a consideration, in such a case, as the payment of money, or the delivery of any species of property whatever: *Outhwite v. Porter*, 13 Mich. 533, 539.

In *Baker v. Pierson*, 5 Mich. 459, it was held that the holder of a mortgage given for a precedent debt was a purchaser for value.

We know of no good reason why one who takes a deed of land in absolute payment of a debt due him, or discharges and pays a note for the maker upon which he is a surety, as the consideration for such deed, has not as good a standing, as a purchaser for value, as one who pays money or exchanges property therefor.

The decree of the court below must be reversed, and the bill of complainant dismissed, with costs of both courts, as against the defendant Kays, whose title must prevail.

BONA FIDE PURCHASER, creditor accepting goods in payment of precedent debt is: *Butters v. Haughwout*, 42 Ill. 18; 89 Am. Dec. 401. Grantee in deed taken for precedent debt is not deemed *bona fide* purchaser against trusts of which he had no notice; but it is otherwise if he releases valid security for such precedent debt: *Padgett v. Lawrance*, 10 Paige, 170; 40 Am. Dec. 232. A conveyance in consideration of the cancellation of a pre-existing indebtedness is a conveyance for a valuable consideration under Civil Code of California: *Foorman v. Wallace*, 75 Cal. 552. One having a quitclaim deed only to realty from his immediate grantor, whether a purchaser or not, is not a *bona fide* purchaser with respect to outstanding and adverse equities shown by record, or which are discoverable by reasonable diligence and inquiry: *Johnson v. Williams*, 37 Kan. 179. When the consideration of a deed is a pre-existing debt, or when a mortgage is taken on the land to secure such indebtedness, it will not, in Texas, support the claim of *bona fide* purchaser: *Steffian v. Milmo etc. Bank*, 69 Tex. 513. One who claims under a quitclaim deed, which on its face purports to convey only the interest of the vendor, cannot be a *bona fide* purchaser: *Lumber Co. v. Hancock*, 70 Id. 312.

PAYMENT BY VOLUNTEER OF ANOTHER'S DEBT is sufficient consideration to support a promise of repayment: *Price v. Towsey*, 3 Litt. 423; 14 Am. Dec. 81.

PAYMENT. — Taking note of debtor or of third person for precedent debt is no payment, unless it be expressly agreed to take the note in payment, and run risk of its being paid: *Berry v. Griffin*, 10 Md. 27; 69 Am. Dec. 123; *Taylor v. Connor*, 41 Miss. 722; 97 Am. Dec. 419; but the taking of promissory note postpones payment of precedent debt until default in payment of note: *Mitchell v. Hackett*, 25 Cal. 538; 85 Am. Dec. 151. Acceptance of promissory note in lieu of precedent debt suspends remedy on first contract till notes mature: *Yates v. Donaldson*, 5 Md. 389; 61 Am. Dec. 283; *Moses v. Trice*, 21 Gratt. 656; 8 Am. Rep. 609; *Nightingale v. Chaffee*, 11 R. I. 609; 23 Am. Rep. 531; *Caldwell v. Hall*, 49 Ark. 508; 4 Am. St. Rep. 64, and note 69.

PAYMENT BY JOINT DEBTOR IS REGARDED in the light of a purchase, where he takes an assignment in the name of a stranger: *Sherwood v. Collier*, 3 Dev. 380; 24 Am. Dec. 264.

HARRIS v. TOWNSHIP OF CLINTON.

[64 MICHIGAN, 447.]

NEGLIGENCE.—IN ACTION FOR INJURY FROM DEFECTIVE HIGHWAY, IF THE FACTS DISCLOSED by the record do not show clearly and indisputably that the plaintiff was guilty of contributory negligence, and upon this issue there are two reasonable but different views which might be taken, the question should be submitted to the jury.

NEGLIGENCE.—RULE IS NOT UNIVERSAL THAT DEFENDANT IS EXCUSED FROM LIABILITY merely because the plaintiff, knowing of the danger caused by the defendant's negligence, voluntarily incurs it. If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, or if, by the defendant's negligence, the plaintiff is placed in a situation of peril, to escape which he voluntarily incurs another danger, the defendant is liable, although the plaintiff may not in the emergency have pursued the course which ordinary prudence would have dictated.

PERSON LAWFULLY USING HIGHWAY, ALTHOUGH HE MEETS WITH OBSTRUCTION or other cause of insufficiency, may yet proceed if it is consistent with reasonable care so to do, and this is generally a question for the jury.

IF DANGER IS KNOWN, AND CAN BE EASILY AVOIDED, peril voluntarily and unnecessarily assumed may constitute such contributory negligence as would preclude recovery.

EMERGENCIES MAY SOMETIMES BE GIVEN IN EVIDENCE, and will justify what would otherwise be an indefensible act; such, for instance, as that of an engineer standing at his post in the endeavor to save the lives of the passengers or others when a collision is imminent, or of a person rushing in front of an engine to save the life of a child, or placing himself in a position of danger to save the life of another. But evidence of the ill health of the plaintiff's wife, and his anxiety to reach home, is properly excluded.

TESTIMONY TENDING TO SHOW CONDITION AND SITUATION OF HIGHWAY, and whether there were any railings or guides to indicate the position of the highway embankment when covered by water, and to protect persons from the danger of driving off, is admissible, as bearing upon the defendant's negligence in not keeping the highway in a condition reasonably safe and fit for public travel.

IN SUIT INVOLVING NEGLIGENCE OF TOWNSHIP IN NOT KEEPING HIGHWAY IN REPAIR, JURY ARE the proper persons to draw all proper inferences from the facts proved, and to determine whether the road was reasonably safe or not, and for this purpose expert testimony is not required.

MICHIGAN STATUTE DOES NOT REQUIRE TOWNSHIP to keep its highways absolutely safe for public travel, but only reasonably safe for that purpose.

Franklin P. Monfort and T. M. Crocker, for the appellant.

Eldredge and Spier, for the defendant.

CHAMPLIN, J. The plaintiff is the proprietor of a livery-stable in the village of Utica. On the morning of May 7, 1885, he let a horse and buggy to Andrew T. Sopher to make

a trip to Mt. Clemens. The road from Utica to Mt. Clemens crosses the north branch of the Clinton River by a bridge. The approach to this bridge from the west was over low land, and the highway passed over an embankment for a distance of about 480 feet. The height of this embankment varied from four to seventeen feet on the north side. The width of the roadway at this point varied from fourteen to eighteen feet. The road-bed had been constructed along the line of what had been a mill-dam, and was not upon a straight line. In passing west, the first object crossed would be the bridge over the north branch of the Clinton River, which, on the day referred to, was above water. Proceeding westward, the embankment turned nearly to the northwest, to a point marked by a thorn-tree, which stood in the south edge of the embankment, a distance of 202 feet from the bridge. Opposite this tree, for a short distance, the land upon the embankment on the north side appeared to be about seven inches above water. At this point the embankment curves to the left, and proceeds in a nearly southwest direction for a distance of 120 feet, when it curves again, and travels in a northwesterly direction to high land, a distance of 185 feet. Opposite the last-mentioned curve, the middle branch of the Clinton River had encroached upon the embankment, and washed away a portion, narrowing the surface at this point to fourteen feet. This embankment had for many years been subject to overflow from the waters of Clinton River, on occasions of freshets caused by rain-fall, and on the day above mentioned was submerged, with the exception of the point opposite the thorn-tree, to the depth of from two feet to two and one half feet. There was no railing or other protection to prevent persons traveling the highway from going off the embankment, or to indicate where the road-bed was when covered by water.

Mr. Sopher was familiar with the road, and knew its general condition and character. He went over the place in question on his way to Mt. Clemens, and found it covered with several inches of water, but had no trouble in making the crossing. This was about midday. At about six in the afternoon he started to return home. He reached the river before dark, and saw that the water had risen considerably during the afternoon. He attempted to drive across, and had proceeded to the point where the middle branch had previously washed away a part of the embankment, when, as he testifies, his horse and wagon went off the embankment on

the right-hand side. He sprang out of the wagon upon grade. His horse turned short to the left, and came upon the embankment. He tried to turn him to the right, but he acted as if crazed, and plunged straight across the embankment into the deep waters which overspread the flats, and was drowned. The cushions and whip were lost, and the wagon was somewhat injured.

Plaintiff brought this action to recover damages for the loss of the horse and injury to his wagon, and bases his right to recover upon the alleged negligence of defendant in suffering the embankment and approach to the bridge to be kept and maintained in a crooked, narrow, winding, washed, tortuous, uncertain, and overflowed condition, misleading and deceiving persons traveling the same, and in wrongfully and negligently failing to erect any railing and guide or barrier along such embankment and approach to the bridge, to prevent persons from driving into danger and deep water on either side of the same, and wrongfully and negligently failing to place any barrier or warning to prevent persons from driving upon and along said highway embankment while said crooked approach to the bridge was washed and overflowed with water and deceiving and misleading to travelers, and wrongfully and negligently suffering such defective highway, so overflowed, to remain open to travelers. The declaration also alleged that Sopher was ignorant of the unsafe and perilous condition of such highway embankment and approach to such bridge, and being misled and deceived by the narrowness, crookedness, windingness, and uncertainty of said highway embankment, and not being in any manner warned thereof, or prevented, upon such highway embankment, and without fault on his part, drove upon said bridge and embankment.

After the testimony was closed, the circuit judge took the case from the jury, and directed a verdict for the defendant, upon the ground that Sopher, who was plaintiff's bailee of the property at the time, was guilty of contributory negligence. He instructed the jury as follows: "If a person, with full knowledge that a highway is unsafe at a particular place, undertakes to pass such dangerous point, he should be held to have done so at his own risk; and if, in this case, Sopher knew that the road was overflowed; that the embankment was narrow and winding; that there were no guard-rails, barriers, or monuments to indicate where the road was; that

where it was so overflowed it was dangerous to cross; and, possessing such knowledge, he undertook to pass such dangerous point,—he should be held to have done so at his own risk. It appears, from his evidence, that he was familiar with this road, and had traveled it frequently for many years. He knew that it was winding, and states that he had heard that others had got into difficulty in undertaking to cross when it was overflowed, and what course he thought he ought to follow in order to avoid an accident; but that he made a mistake by being misled by a little spot of land that was not overflowed, and went farther to the right than he should have done, and the horse got off into deep water. He had crossed the embankment that same afternoon, relying upon his familiarity with it, and it was then overflowed with water. When he returned, he saw that the water was higher, and knew that the risk was greater, but he preferred to take his chances of navigating safely across, rather than seek some other route, or wait a few hours until the water had subsided."

We do not think that the facts disclosed by the record showed clearly and indisputably that the plaintiff's bailee was guilty of contributory negligence. Upon this issue there are two reasonable but different views which might be taken, and therefore the question should have been submitted to the jury. The fact that Sopher knew the location of the highway, that it was crooked, that there were no guides or barriers, that it was overflowed, and the water had raised since he last passed over it, and knew that some hazard was incurred in attempting to pass over it, did not conclusively show that it was negligence in him to make the attempt. Of course, the increased hazard from the rising of the water called upon Sopher to exercise increased caution, and may have been a circumstance which, in the opinion of some persons, should have determined him not to make the attempt at all; but whether it was or not, in connection with the other facts, should have been left with the jury to determine.

It is not a universal rule that the defendant is excused from liability merely because the plaintiff, knowing of the danger caused by defendant's negligence, voluntarily incurs that danger. If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, or if plaintiff, by defendant's negligence, is placed in a situation of peril, to escape which he voluntarily incurs another danger, the defendant is liable, although the plaintiff may not, in the

emergency, have pursued the course which ordinary prudence would have dictated.

The danger in this instance consisted in the liability of driving off the embankment because it was more or less obscured by the water flowing over it. If Sopher negligently incurred this danger, that is to say, if he was not acting as a reasonable man would act under the circumstances, the plaintiff cannot recover. It should be remembered that the risk of driving off the embankment when obscured by the overflow of water was no greater than the risk of driving off on a dark night. In one case the vision is obscured by water, and in the other by darkness; and it would hardly be claimed that it would be negligence *per se* to attempt to drive over this portion of the highway on a dark night. Whether it would be negligence in a particular instance would depend upon all the facts and circumstances, which should be submitted to the jury.

We have examined the authorities cited by the defendant's counsel. The case mainly relied upon is *Fox v. Glastenbury*, 29 Conn. 204, which, in some of its features, is quite parallel to the one at bar. An inlet from the Connecticut River ran up into the mainland. About twenty-seven rods from its mouth, a highway had been laid out, across this inlet, to a ferry, and a causeway constructed across for the accommodation of the public. The causeway was about twenty-five rods long, and nineteen feet wide, and was raised about two feet above the ordinary stage of water. There was a bridge about nine rods from the easterly end of it. The water alongside of the causeway was ordinarily about one foot deep, but in times of freshet, frequently rose so high as to submerge the causeway, and render its passage perilous, and sometimes impossible. About two rods west of the bridge, there was a curve in the direction of the causeway of about sixty-three degrees. There was a freshet in the river at the time of the accident, which entirely covered the causeway. The water was rising rapidly, and there was a strong wind. The bridge was not submerged.

About three o'clock in the afternoon, Harriet Fox and Mrs. Clarinda Fox, who were both well acquainted with the highway, procured a horse and wagon, and started to go over the causeway to the ferry. When they came in full view of it, they stopped in front of the residence of Mrs. French, and inquired of her whether people had crossed there that day, to

which she replied they had, but that she had seen no one pass that way that afternoon, and that she had not noticed before that the water was over the road. The deceased (Harriet Fox) then inquired of Mrs. French if she would dare to cross. She replied that she would be afraid unless she had a very gentle horse, and the deceased remarked that their horse was perfectly gentle. They made the attempt, which resulted in their getting off the causeway, and the death of Harriet Fox.

Action was brought against the town to recover damages for the loss of her life by reason of its negligence in not maintaining a railing along the sides of the causeway. The court, in deciding the case, used this language: "We think that in driving upon the causeway at all, even easterly of the bridge, submerged, as they saw it was, and with nothing visible above the surface of the water to indicate its true location, these ladies disregarded the dictates of ordinary prudence and discretion."

And again: "The attempt of these ladies to pass over ~~this~~ causeway, and especially over the western part of it, was an act of rashness, which, upon the well-settled principles of law applicable in cases of this character, bars all claims in their behalf for damages from the town. We think no person of ordinary prudence and discretion would make such attempt."

We are not disposed to follow the court in this case in pronouncing the conduct of the deceased negligence *per se*.

The correct principle in cases of this kind is laid down in *Kelley v. Fond du Lac*, 31 Wis. 179, 187, as follows: "The fact that a traveler sees an obstruction or other defect, and knows its dangerous character, is not conclusive proof that he was negligent in attempting to pass it. A person who, in the lawful use of a highway, meets with an obstacle or other cause of insufficiency, may yet proceed if it is consistent with reasonable care so to do; and this is generally a question for the jury, depending upon the nature of the obstruction or insufficiency, and all the circumstances surrounding the party."

The principle here stated was recognized in *Bronson v. Southbury*, 37 Conn. 199. See also *Mahoney v. Metropolitan R. R. Co.*, 104 Mass. 73; *Thomas v. Western Union Tel. Co.*, 100 Id. 157; *Horton v. Ipswich*, 12 Cush. 488; *Hubbard v. Concord*, 35 N. H. 52.

If the danger is known, and can be easily avoided, a peril voluntarily and unnecessarily assumed may constitute such contributory negligence as would preclude a recovery: *Erie*

v. *Magill*, 101 Pa. St. 616; 47 Am. Rep. 739; *Schaefer v. Sandusky*, 33 Ohio St. 246; *Wilson v. Charlestown*, 8 Allen, 137; 85 Am. Dec. 693; *Centralia v. Krouse*, 64 Ill. 19; *Parkhill v. Brighton*, 61 Iowa, 103; *Cook v. Johnson*, 58 Mich. 437; 55 Am. Rep. 703.

The cases cited above were mostly cases of defective sidewalks, where the danger could easily have been avoided, and no risk incurred. In the case before us the record does not disclose any other way which the plaintiff's bailee could have taken to avoid the danger of crossing upon the embankment.

It was urged if Sopher was guilty of negligence which would preclude him from recovering damages against the township, his negligence could not be imputed to the plaintiff, so as to bar his right of recovery, if he was damaged through defendant's negligence. The point is not raised by any assignment of error, and is inconsistent with the case made by the plaintiff's declaration, and calls for no decision upon this record.

There was no error in excluding testimony to prove that Sopher's wife was in ill health, and his anxiety to reach home. It could not be considered as an element of proof to excuse him from incurring risks which he might not otherwise have taken, or measuring the care which a prudent man would have exercised under the circumstances.

Emergencies may sometimes be given in evidence, and will justify what otherwise would be considered a rash and indefensible act,—such as those of an engineer of a train of cars standing at his post in the endeavor to save the lives of the passengers or others when a collision is imminent; of a person rushing in front of an engine to save the life of a child; of a person placing himself in a position of danger to save the life of another: *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502; 3 Am. Rep. 721; *Linnehan v. Sampson*, 126 Mass. 506; 30 Am. Rep. 692; *Cottrill v. Chicago etc. R'y Co.*, 47 Wis. 634; 32 Am. Rep. 796; *Pennsylvania Co. v. Roney*, 89 Ind. 453; 46 Am. Rep. 173.

But mere illness in a family which does not hinder a person from the prosecution of his ordinary business, or prevent him from leaving home to perform the ordinary duties of a constable, as was this case, cannot be considered as a circumstance attending the transaction which the jury would be authorized to consider in determining whether he acted as a prudent man would in attempting to cross, or in crossing, the stream in question: *Hyde v. Jamaica*, 27 Vt. 443, 464.

The court also erred in excluding testimony covered by the second, third, fourth, and fifth assignments of error. The testimony offered tended to show the condition and situation of the highway, and whether there were any railings or guides to indicate the position of the highway embankment when covered by water, and to protect persons from the danger of driving off. This was proper testimony as bearing upon the negligence of the defendant in not keeping the highway in a condition reasonably safe and fit for the public travel: *Carver v. Detroit and Saline Plank Road Co.*, 61 Mich. 584.

The tenth assignment of error is overruled. The question was: "State whether or not, from your knowledge of roads and observation of this, it is or not a safe road."

The jury were the proper persons to draw all proper inferences from the facts proved, and from such facts and inferences therefrom it was their province to determine whether the road was reasonably safe or not. It did not require expert testimony to show the condition of the road; and if it did, the witness was not shown to have been an expert: *Ryerson v. Abington*, 102 Mass. 531; *Kelley v. Fond du Lac*, 31 Wis. 179, 186.

But the question was improper for another reason. The township is not obliged to keep its highways absolutely safe for travel. The statute only requires that it shall keep them reasonably safe and fit for public travel. The question, therefore, if otherwise proper, was too broad, and not within the limitation of the statute.

The errors complained of in the charge, and refusals to charge, are covered by what we have already said.

The judgment must be reversed, and a new trial ordered.

CONTRIBUTORY NEGLIGENCE, when question for jury, and when for the court: Note to *Mynning v. Detroit etc. R'y Co.*, 64 Mich. 93; *ante*, p. 813. Negligence, except in the failure to perform a statutory duty, is rarely a question of law; and being generally a question of fact, it is not proper to direct the jury what specific acts constitute contributory negligence. Contributory negligence on part of defendant not violation of a statutory duty must depend upon the facts of the particular case, of which the jury alone are the judges: *Railway Co. v. Greenlee*, 70 Tex. 553. There are exceptional cases of negligence, in which, the measure of duty being determinate, the same under all circumstances, as for instance the rule of requiring all persons about to cross a railroad track to stop, look, and listen, the question is for the court; but as negligence is the absence of care, according to circumstances, when there is a reasonable doubt as to the facts or as to the inferences to be drawn from them, or when the measure of duty is ordinary, and reasonable care and the degree of care required varies according to the cir-

circumstances, the question of negligence is necessarily for the jury: *Pennsylvania R'y Co. v. Peters*, 116 Pa. St. 206.

CONTRIBUTORY NEGLIGENCE, WHEN DOES NOT PREVENT RECOVERY: Note to *Brannen v. Kokomo etc.*, 115 Ind. 115; 7 Am. St. Rep. 417; *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 529. Slight contributory negligence does not bar recovery: *Wichita etc. R. R. Co. v. Davis*, 37 Kan. 743; 1 Am. St. Rep. 275, and note 279. Contributory negligence of third person will not bar recovery: *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55. One who drives his cattle over a railroad-crossing without looking or listening for an approaching train is guilty of negligence, but where the cattle are killed by a train, and it is shown that the company's employees, by the use of ordinary care and prudence, could have avoided the injury after discovering the danger, a recovery cannot be defeated on account of the owner's contributory negligence: *Wooster v. Chicago etc. R'y Co.*, 74 Iowa, 593. Contributory negligence will not prevent recovery where action of defendant is wanton, willful, or reckless: *Bouwmeester v. Grand Rapids etc. R'y Co.*, 63 Mich. 557. Where train stops at the station to which a passenger is bound, but before he is able to alight, it is started again, and he is injured in attempting to alight, under the conductor's direction, while the train is moving slowly, and the danger is not apparent, he is not guilty of such contributory negligence as will bar recovery: *St. Louis etc. R'y v. Person*, 49 Ark. 182. Where injuries are caused by sole negligence of defendant, company is liable in damages; but if deceased was guilty of negligence, which was the proximate cause of his death, the company is not liable, unless after discovering the deceased's negligence, it failed to use proper care to avoid the consequence of such negligence: *Virginia etc. R'y v. Barksdale's Adm'r*, 82 Va. 330.

CONTRIBUTORY NEGLIGENCE, INSTANCES OF WHAT IS NOT. — Engineer remaining at his post of duty is not guilty of: *Central R'y v. Crosby*, 74 Ga. 737; 58 Am. Rep. 463; trying to ford a flooded highway is not necessarily contributory negligence: *Merrill v. North Yarmouth*, 73 Me. 200; 57 Am. Rep. 794; walking upon defective sidewalk is not necessarily contributory negligence: *City of Altoona v. Lotz*, 114 Pa. St. 238; 60 Am. Rep. 346; it is not necessarily contributory negligence for traveler, knowing dangerous condition of highway, to travel upon it, no other safe way being in use: *Town of Albion v. Hetrick*, 90 Ind. 545; 46 Am. Rep. 230; *Henry Co. etc. v. Jackson*, 86 Ind. 111; 44 Am. Rep. 274. One who pays little heed to his surroundings, and goes hither and thither in an absent-minded manner, or thinking only of some particular object, and shutting his eyes to everything else, is guilty of an inattention sometimes dangerous to himself, and quite as often to his neighbors, and a want of that ordinary care which the safety of society requires all sane persons of mature age to exercise, and for which they are civilly liable: *Hutchins v. Priestly etc. Co.*, 61 Mich. 252. Although a minor killed while playing upon a turn-table of a railway company had sufficient intelligence to know that it was wrong to trespass upon the turn-table, yet if he had no knowledge that playing upon the table was unsafe or dangerous, it cannot be said that he was guilty of contributory negligence: *Union etc. R'y v. Dunden*, 37 Kan. 1. It is not contributory negligence on the part of plaintiff, where she—the cars having stopped for dinner—alighted from the train and subsequently resumed her seat without direction to do so from the train-men, and was injured by a collision of the engine with the cars: *Lakin v. Oregon etc. R. R. Co.*, 15 Or. 220. If one having no other way to reach a town, where he transacted business, than over a railway

bridge where road crosses railway track, is injured by attempting to cross such bridge, the fact that he had reason to believe the bridge unsafe, it being used by public at the time, does not conclusively establish contributory negligence; the question is one for jury to determine: *Gulf etc. R'y v. Gasscamp*, 69 Tex. 545.

CONTRIBUTORY NEGLIGENCE, INSTANCES OF WHAT IS. — One attempting to cross a sidewalk known to him to be dangerous, which he might easily avoid, is guilty of contributory negligence: *Schaeffer v. City of Sandusky*, 33 Ohio St. 246; 31 Am. Rep. 533; *City of Quincy v. Barten*, 81 Ill. 300; 25 Am. Rep. 278; *City of Erie v. Magill*, 101 Pa. St. 616; 47 Am. Rep. 739. In an action for a personal injury received at a highway-crossing by a collision with a moving train, where evidence showed that plaintiff, as he approached crossing, with which he was familiar, was in full view of the railway track for fifteen hundred feet until he came within ten rods of crossing, where such view was obstructed until he came within three rods of crossing, from which point to railroad track an approaching train could be seen for a distance of eighty rods, and where plaintiff testifies that he looked for and saw the train, but it was too near for escape, there is such contributory negligence as will bar recovery: *Indiana etc. R'y Co. v. Hammock*, 113 Ind. 1. Omission of one to look for approaching trains, when he is about to cross railroad track, constitutes such contributory negligence as will bar recovery: *Young v. New York etc. R'y*, 107 N. Y. 500. One who attempts to pass between coupled cars of a freight train standing temporarily across street, and either knows or might know by using his natural faculties that train is likely to move at any moment, is guilty of such contributory negligence as will prevent recovery for injury sustained from starting of the train: *Lake Shore etc. R'y Co. v. Pinchin*, 112 Ind. 592. Where plaintiff was struck by defendant's engine, with a head-light burning in it, which could be seen 350 feet from crossing, in absence of evidence that engineer could have avoided the accident, plaintiff was guilty of such negligence as would prevent his recovery: *Bloomfield v. Burlington etc. R. R. Co.*, 74 Iowa, 607. Where a defendant has been guilty of negligence, yet if plaintiff, by use of ordinary care and prudence, could have averted the accident, he is not entitled to recover: *Meredith v. Cranberry etc. Co.*, 99 N. C. 576. Where defendant's track-walker found B. at night asleep upon the track, and aroused him and told him of his danger, and B. raised himself and signified his apprehension of his danger, and did not appear to be disabled by intoxication or otherwise, but after track-walker left, he still remained on track, and was run over and killed, B. was guilty of such negligence as would bar his representatives from recovering for his death: *Virginia Midland R. R. Co. v. Boswell's Adm'r*, 82 Va. 932.

HIGHWAYS, STREETS, AND SIDEWALKS, officers of municipality are bound only to keep in a reasonably safe condition: 49 Am. Rep. 561; *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55, and note 59; *North Manheim Township v. Arnold*, 119 Pa. St. 380; 4 Am. St. Rep. 650, and note 653; *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453, and note 459.

DEVILLE v. WIDOE.

[64 MICHIGAN, 593.]

HOMESTEADS. — CITY LOT PURCHASED WITH INTENTION OF MAKING IT HOMESTEAD for the purchaser and his family will be exempt from levy and sale on execution from the time of purchase, even though unimproved and without a dwelling thereon, if the purchaser incloses it and uses and occupies it with the constant purpose of making it his home, and uses the proceeds thereof, and such means as he can procure, within a reasonable time, to erect a house thereon for his family, provided it does not exceed in quantity and value the constitutional limit. What will be regarded as a reasonable time must necessarily depend upon the circumstances of the particular case.

Frank G. Holmes, for the complainant.

R. W. Powers and Peter Doran, for the defendant.

SHERWOOD, J. The bill in this case is filed by the complainant, and prays that a certain execution levy upon his house and lot, situate in Grand Rapids, may be set aside and declared void, for the reason that at the time of the levy the property consisted of one lot worth less than fifteen hundred dollars, and was his homestead.

The case was heard in the Kent circuit, before Hon. Robert M. Montgomery, circuit judge, upon pleadings and proofs, and a decree was made granting the relief prayed. After a careful inspection of the record, I have no doubt of the correctness of the conclusion reached by the learned circuit judge. The following facts, I think, are sufficiently established by the pleadings and proofs in the case: —

The complainant purchased the lot in question, which was then vacant, and which was about forty-seven feet wide, on Plainfield Avenue, of Charles W. Coit, on the twenty-fourth day of October, 1881. He has never owned any other real estate since. The lot contains about an acre, consisting of part of a platted lot, and was located, when bought, in a thickly settled district, — residence property mostly on either side of it.

When the property was sold to the complainant, the vendor understood it was for a homestead, and the complainant purchased it with the intention of making it his homestead, as well as a place upon which he could carry on his business, which was selling meat.

He paid eight hundred dollars for the lot, — paid two hundred dollars down, and gave a mortgage upon the property to

secure payment of the balance,—and commenced improving the lot November 10th, after the purchase.

At the time of the purchase, he was engaged in carrying on a meat-market on the same street, near the property. His ground-lease having expired, he moved the little shop in which he was doing business onto his own lot, placing it about fifty feet back from the street. His plan, however, was to erect a building on the front of his lot sufficiently large and suitable for carrying on his little meat business, and furnish him a comfortable residence for his family; and very soon after taking possession of his lot, in the month of November, he made an unsuccessful effort to raise the money to build such a building. He then decided to erect so much of the building as would be necessary for his business purposes, and in such manner that he could thereafter add thereto the part he had intended for the residence of his family when he could get the necessary means. This he did, and in January following built an ice-house on the lot for the use of his market and family, and in November, 1882, built a barn upon the premises for the accommodation of the horse he used in his business.

In this condition the complainant used the property during the year 1883, making several efforts, however, during the year, with one or more parties, to negotiate a contract for building the residence in connection with his market as hereinbefore mentioned. He did not succeed in making the arrangement for putting up the addition to his building, which was to constitute the apartments and home for his family, until the month of July, 1884, when he made a contract for the lumber, and dug a cellar for the building. The party who furnished the lumber for the completion of the building commenced delivering it upon the ground on the second day of August, 1884, and the building was completed, and the complainant moved into it, with his family, a few months thereafter.

After the building was completed, the assessor valued the property at one thousand dollars. From the time the complainant took possession of the property until he moved his family into the building, he occupied the property himself. He used the building first erected for his meat-market, fenced the lot, and raised upon it vegetables for his family, and some feed for his horse, and, so far as we can discover from the record, designed the property for his homestead, and so expressed

himself in regard to the property whenever he had any conversation upon the subject of its improvement, or whenever any person in like circumstances would be likely to give expression to his intentions.

On the sixth day of August, 1884, defendant held a judgment in his favor against the complainant, and caused the same, on that day, to be levied upon the property. Some time after the levy was made, complainant notified defendant that the property levied upon was his homestead, and asked him to release and discharge his levy. This defendant refused to do, claiming that the property was not complainant's homestead, and instructed the sheriff to proceed with his levy, and advertise and sell the property, who proposed to obey the instruction of defendant; and thereupon the complainant filed this bill.

The only question in the case needing consideration is, Was the property the complainant's homestead? There can be no question, if it was, but that the defendant's levy clouded the complainant's title. We think it was shown to be within the constitutional limit as to size and value. It was encumbered by mortgage, at the time of the levy, to the amount of about \$478; and it sufficiently appears that, as fast as the complainant was able, he improved the property, with a view of making it his homestead, and had really commenced the erection of that portion of the building which he designed for, and which, as soon as completed, he occupied for, the residence of himself and family. We have no doubt about the good faith in which all the improvements were made, and under such circumstances, it would be, in our judgment, inequitable and unjust to attempt to divest the property of its homestead character.

We think the case falls clearly within the spirit of the constitution and statute providing for the exemption of a homestead, and the decisions of this court made thereunder.

A city lot purchased with the intention of making it a homestead for the purchaser and his family will be exempt from levy and sale on execution from the time of purchase, even though unimproved and without a dwelling thereon, if the purchaser incloses it and uses and occupies it with the constant purpose of making it his home, and uses the proceeds thereof, and such means as he can procure, within a reasonable time, to erect a house thereon for his family, provided it does not exceed in quantity and value the constitutional limit.

What will be regarded as a reasonable time must neces-

sarily depend upon the circumstances of each particular case.

The following authorities will be found to give support to the views herein expressed: *Reske v. Reske*, 51 Mich. 541; 47 Am. Rep. 594; *Barber v. Rorabeck*, 36 Mich. 399; *Bouchard v. Bourassa*, 57 Id. 8; *Griffin v. Nichols*, 51 Id. 575. See also *Schofield v. Hopkins*, 61 Wis. 370.

We do not think, under the circumstances of this case, that the time taken by the complainant to improve the lot in such manner as to make a comfortable home for himself and family was unreasonable; and the decree of the circuit judge must be affirmed.

HOMESTEADS, WHEN REALTY BECOMES: *Reske v. Reske*, 51 Mich. 541; 47 Am. Rep. 594; *Hawthorne v. Smith*, 3 Nev. 182; 93 Am. Dec. 397; note to *Arendt v. Mace*, 76 Cal. 315; 9 Am. St. Rep.

HOMESTEADS — SELECTION BY PRESUMPTION. — Where the head of a family, being entitled to select either of two parcels of land as his homestead, conveys one of the tracts, he is held to have selected other land than that conveyed as his homestead: *Rutherford v. Jamieson*, 65 Miss. 219.

HUNT v. ORDER OF CHOSEN FRIENDS.

[64 MICHIGAN, 671.]

EVIDENCE — CHURCH RECORDS. — FORMER ENGLISH RULE WHICH RECOGNIZED NONE BUT REGISTERS and similar records of churches of the established religion has been abrogated, in England, by statute, so as to open the door to many other records which all churches keep, and which are as likely to be accurate as those of an established church. Such records serve a purpose equivalent to that served by family records, and in this country they are fairly to be dealt with as equivalent to corporation records, which are generally evidence of such matters as are recorded in the usual course of affairs.

FRAUD CANNOT BE PRESUMED IN RECORDS OF CHURCHES any more than in any other documents preserved for similar purposes.

DOCUMENT CONSISTING OF LEAF TAKEN, AFTER HIS DEATH, FROM SOLDIER'S PRIVATE RECORD-BOOK, required to be kept by soldiers in the British service, and containing the names of the soldier and his wife, and the names, ages, and places of birth of all his children, is competent to prove relationships and the ages of the children; and its removal from the book in no way derogates from its authenticity, so long as it was traced and explained.

COURT CANNOT PROPERLY SUBMIT TO JURY facts on which the testimony is all one way.

Haug and Springer, and Edwin F. Conely, for the appellant.
George S. Hosmer, for the defendant.

CAMPBELL, C. J. Plaintiff sued as beneficiary named in a benefit association certificate issued to one Maggie Gibbons in April, 1883, the amount having, as claimed, become due on the death of the person who became a member when the certificate issued. The defense rested chiefly on two grounds, — one being that plaintiff was not so related to the decedent as to be entitled to take the benefit, and the other that the deceased, on securing membership, misrepresented her age by about ten years. The court below directed a verdict for defendant.

The company sued was not organized under the laws of Michigan, and we have no means from the record of knowing whether the restrictions put by our laws on the relationship of the members and beneficiaries exist in the state of Indiana, where the company was formed. As the certificate is payable to plaintiff, and as no particular stress seems to have been laid on this point below or here, we need not consider it.

It is evident from the terms of membership that the age of applicants is regarded as very material, and misrepresentation is made ground of forfeiture. It not only changes the actual risk, but the membership dues are measured by it, so as to make a difference of several per cent between the age of the deceased, as shown by the testimony, and her age as represented to the defendant. This was the basis of the decision below.

It was shown, without contradiction, if the testimony was admissible, that decedent was born December 14, 1842, and and was therefore between forty and forty-one years old when she became a member of the defendant company. Her application represented that she was a little over thirty-two. The difference of just eight years is very great, and one which cannot be accounted for by any theory that would save the membership. The representation was a warranty, and it was also very material.

The age of decedent was not shown by plaintiff at all, and by defendant was proved by three distinct pieces of testimony. The first was a sworn and examined extract from the parish record of the Catholic Church at Amherstburg, Ontario, which showed her baptism in the latter part of December, 1842; reciting the names of her parents, with the description of her father as a soldier, and a statement of her age as born December 14, 1842. The priest swore this record was required

by the rules of the church to be kept. It was more than thirty years old.

Another document was a leaf, sworn to as taken, after his death, from the soldier's private record-book, required to be kept by soldiers in the British service, containing the names of the father and his wife, and the names, ages, and places of birth of all his children. In that record, the description of decedent exactly corresponds with the parish record. This leaf was sworn to by an older sister of decedent, who removed it from the book after her father's death, in order to preserve the memoranda.

This sister also swore to the age of decedent, by reference to her own age as several years the elder of the deceased.

Deceased was fully identified as the daughter of her parents and sister of the witness, in whose name the policy was first made out, and who paid several of the assessments.

It was objected, however, that these documents should not have been received. So far as the family memorandum is concerned, there is no authority against its reception. It was precisely like the entries in a family Bible, or other family book used for keeping family minutes. The use of such things is almost universal, and it would generally be difficult, if not impossible, to prove relationships and ages without them. It in no way derogates from authenticity that it has been torn out of the book which originally held it, so long as it was traced and explained. It is on a printed form evidently designed for uniform army use, and it was kept by the father of deceased, so long as he lived, for the purposes mentioned.

There is no reason why the parish register should not be received and credited. The rule laid down in England, and followed until recent times, which recognized none but registers and similar records of churches of the established religion, has been abrogated there by statute, so as to open the door to many other records which all churches keep, and which are quite as likely to be accurate as those of an established church. Those registers serve a purpose equivalent to that served by family records. In this country they are fairly to be dealt with as equivalent to corporation records, which are generally evidence of such matters as are recorded in the usual course of affairs. There is not much authority on the subject here, but all the analogies and reasons which apply to other presumptively correct documents apply to

these. In this state, while it has not been definitely decided by any reported decision of this court, it has been universal practice to receive such entries and papers as reliable evidence. In *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164, a marriage was proved in that way; and in *Durfee v. Abbott*, 61 Mich. 471, recently decided by this court, in a case sharply contested, the records of a Lutheran church in Detroit, showing the baptism of one of the parties, were resorted to, and practically disposed of a main issue in the case, being regarded as proof of the time of baptism, although not of the age, of the infant as there set out. The person described as being baptised is thereby identified as in being at that date.

The question was decided in favor of such entries in an early case in the supreme court of the United States, where the entries of burial in a church in Philadelphia were held admissible in a land controversy in Kentucky, tried in one of the courts of the United States. It was there held expressly that they were competent testimony: *Lewis v. Marshall*, 5 Pet. 470.

There is no more reason to suppose these entries will be incorrect or falsified than any other. Fraud is possible anywhere; but it cannot be presumed in records of churches any more than any other documents preserved for similar purposes. The rejection of such proofs would be disastrous. They are relied on by the whole community.

If anything had been introduced to contradict these facts shown by the documents, and by the testimony of the sister of deceased, there might have been issues raised that should have gone to the jury. But a court cannot properly submit to a jury facts on which the testimony is all one way: *Wisner v. Davenport*, 5 Mich. 501; *Pennsylvania Mining Co. v. Brady*, 16 Id. 332; *Medina Township v. Perkins*, 48 Id. 67; *Seligman v. Estate of Ten Eyck*, 49 Id. 104; *Chadwick v. Butler*, 28 Id., 2d. ed., 349, and notes.

Plaintiff had the burden of making out her claim; and while the recital of age in the certificate of membership would perhaps have availed her had no inquiry been made as to age, it was merely the decedent's own statement, and could avail nothing against testimony. Here there was testimony that was positive and unambiguous, and it must stand until contradicted or impaired.

The court below took this view, and the judgment should be affirmed.

DOCUMENTARY EVIDENCE. — Entries in family Bible are admissible to prove date of birth, etc., when primary evidence cannot be obtained: *Campbell v. Wilson*, 23 Tex. 252; 76 Am. Dec. 67; *Carskadden v. Poorman*, 10 Watts, 82; 36 Am. Dec. 145; *Robinson v. Blakely*, 4 Rich. 586; 55 Am. Dec. 703.

JURY, RIGHT OF TRIAL BY, MUST BE KEPT INVIOLETE, but it only applies to criminal cases and suits at common law: *Scudder v. Trenton etc.*, 1 N. J. Ch. 694; 23 Am. Dec. 756. Jury is unnecessary in an action upon obligatory paper: *Baughner v. Nelson*, 9 Gill, 299; 52 Am. Dec. 694. Where any essential part of a cause is exclusively of equitable cognizance, the whole is drawn into equity, and a demand for a jury in an action on a promissory note, and to set aside an alleged fraudulent conveyance, should be refused: *Towns v. Smith*, 115 Ind. 480. Where, in an action at law, a third party, claiming to own the cause of action, has been brought in and substituted as defendant, and the original defendant has been discharged, on payment into court of the amount of demand, in pursuance of the provision of the code, the action becomes equitable, triable by the court, and neither party can demand a jury: *Clark v. Masher*, 107 N. Y. 118; 1 Am. St. Rep. 798.

HUFFORD v. GRAND RAPIDS AND INDIANA R. R. CO.

[64 MICHIGAN, 631.]

COMMON CARRIERS — AGENT'S STATEMENT. — **PURCHASER IN GOOD FAITH OF RAILWAY PASSENGER-TICKET HAS RIGHT TO RELY** upon the statement of the company's agent who sold him the ticket that it was good, and entitled him to a ride between two stations named, the ticket being a genuine one issued by the company, which the agent had a right to sell to passengers. The ticket constitutes the evidence agreed upon by the parties, by which the company should thereafter recognize the rights of the purchaser in his contract, and is conclusive upon the subject.

RAILWAY PASSENGERS ARE NOT REQUIRED TO KNOW the rules and regulations made by the directors of the company for the control of the actions of its agents and the management of its affairs.

PRACTICE. — **MICHIGAN STATUTE, ACT NO. 101, LAWS OF 1885**, whereby party aggrieved may assign errors upon the charge of the trial court without taking exceptions on the trial, is remedial, and was intended to apply to cases then pending as well as to those thereafter to be commenced.

Taggart and Denison, for the appellant.

T. J. O'Brien and J. H. Campbell, for the defendant.

SHERWOOD, J. In this case the plaintiff sues the defendant for an alleged assault and battery, which he avers was committed upon him on the nineteenth day of September, 1882, by one of the conductors of the defendant, while he was riding upon one of its trains, without any justification.

The case was tried before Judge Montgomery, in the Kent circuit, by jury, and the plaintiff failed to recover, and now brings error.

The case was before this court on error at the January term, 1884. A new trial was then ordered, which has since been had, the proceedings in which we are now called upon to review. The plea in the case was the general issue.

The plaintiff's claim is, that the conductor wrongfully threatened to expel him from the cars of defendant, and for that purpose laid violent hands upon him, and thereby compelled the plaintiff, who was in feeble health at the time, to pay fare a second time, the plaintiff having bought and paid for a ticket, which the conductor refused to take.

The ticket held by the plaintiff, when purchased by him at Manton, was represented to him by the agent as good to Traverse City. Traverse City is located on one of defendant's branch lines, connecting with the main line at Walton junction, which is situated about nine miles north of Manton, and it was between these two stations that the alleged altercation occurred. If what the plaintiff states is true, the defendant owed him a ride on its train to Walton junction; and if what the defendant's conductor testifies to is true, the ticket held by the plaintiff did not furnish the proper evidence of the plaintiff's right to ride between the points named.

Counsel for defendant claims that, as between the conductor and the passenger, the former can only accept a ticket from the latter in payment of fare when it contains upon its face the marks, words, letters, and figures required by the rules of the company to be placed thereon, showing the holder's right to ride, and that what appears upon the face of the ticket is conclusive between them; that the conductor has the right to act accordingly. It was upon this theory the cause was tried and submitted to the jury.

The ticket purchased was part of an excursion ticket, good when first issued for a ride from Sturgis to Traverse City. After the plaintiff had purchased and paid for the ticket, he observed it did not look like the tickets he had been accustomed to purchase, and thereupon he returned to the ticket-office, and asked the agent if it was good, and was informed by the agent it was. He then entered the defendant's passenger-coach, and the train moved on for Walton junction.

When the conductor asked for the plaintiff's fare, he delivered to him the ticket he had thus purchased. The conductor told plaintiff he could not receive it for his fare, whereupon plaintiff informed the conductor that he bought the ticket at Manton of the company's agent, and was in-

formed by him it was good; that he paid the agent for the ticket, and he should not pay his fare again. The conductor then laid his hand upon plaintiff's shoulder, and rang the bell, and told the plaintiff, unless he paid the fare, which was twenty-five cents, he would put the plaintiff off the train. The plaintiff then, under protest, paid the fare demanded of him.

These facts appear by the record, and are not disputed. Whether or not the ticket had been canceled between Grand Rapids and Walton junction by conductor's marks was a fact contested before the jury, and upon this subject the court charged the jury: "If the ticket had been canceled between those points, then, upon its face, it was an invalid ticket, and, when the fact was called to the attention of the plaintiff, he had no longer a right to insist upon being transferred over this line upon that ticket."

And further charged: "If it was not valid upon its face, but had been canceled between those points, the plaintiff cannot recover in this action."

In response to a question from a juror, the court further charged as follows: "I said to you that if the ticket, upon its face, appeared to be a genuine ticket, entitling the party to ride between the stations named, Manton and Walton junction, and had no evidence of its infirmity, or of having been used before, and the plaintiff purchased it in good faith, and believed that it entitled him to a ride between the stations, then it should be treated as such, and the party would have a right to refuse to leave the car; but that if the ticket was punched, indicating to the conductor by the punch-mark that it had been used between Grand Rapids and Walton junction, that would be evidence of an infirmity of the ticket, and the plaintiff would not be entitled to insist upon that ticket being received."

These charges, with the exception of that wherein the court says the plaintiff would have a right to refuse to leave the cars, are erroneous.

There seems to be no question but that the plaintiff purchased his ticket of an agent of the company, who had the right to sell the same and receive the plaintiff's money therefor; that the ticket covered the distance between the two stations, and was purchased by the plaintiff in perfect good faith; that the ticket was genuine, and was issued by the company, and one which its agents had the right to sell to

passengers. The plaintiff had a right to rely upon the statements of the agent that it was good, and entitled him to a ride between the two stations. It was a contract for a ride between the two stations that the defendant's agent had a right to make, and did make, with the plaintiff.

The ticket given by the agent to the plaintiff was the evidence agreed upon by the parties, by which the defendant should thereafter recognize the rights of plaintiff in his contract; and neither the company nor any of its agents could thereafter be permitted to say the ticket was not such evidence, and conclusive upon the subject. Passengers are not interested in the internal affairs of the companies whose coaches they ride in, nor are they required to know the rules and regulations made by the directors of a company for the control of the action of its agents and the management of its affairs.

When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks. All sorts of people travel upon the cars; and the regulations and management of the company's business and trains which would not protect the educated and uneducated, the wise and the ignorant, alike, would be unreasonable indeed. On the undisputed facts in this case, I think the plaintiff was entitled to go to Walton junction upon the ticket he presented to the conductor: *Maroney v. Old Colony & N. R'y Co.*, 106 Mass. 153; 8 Am. Rep. 305; *Murdock v. Boston & A. R. R. Co.*, 137 Mass. 293; 50 Am. Rep. 307. See this case in 53 Mich. 118.

In this case the trial was concluded on March 14, 1885. The bill of exceptions was settled May 26, 1886, and errors were assigned in this court on May 31st following.

On the 14th of May, 1885, act No. 101, Laws of 1885, was approved, whereby a party aggrieved by the charge of the circuit judge may assign errors upon such charge in this court the same as if exceptions had been taken thereto at the circuit. I think errors in this case were properly assigned to the charge. The statute applies to a question of practice only. It is a remedial statute, and was intended to apply to cases then pending as well as to those thereafter to be commenced.

There is no discussion of the other questions raised required for a proper disposition of the case.

The judgment must be reversed, and a new trial granted.

RAILWAYS. — NOTICE OF PRIVATE RULES AND REGULATIONS of company prescribing duty and power of employee must be brought home to knowledge of persons before they can be affected thereby: *Lake Shore etc. R'y Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510.

RAILWAY COMPANY holding out agent as competent and fit to be trusted warrants good conduct in scope of agency, and is liable for injury resulting from misconduct or negligence of agent: *Pennsylvania R. R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323; *New Orleans etc. R. R. Co. v. Allbritton*, 38 Miss. 242; 75 Am. Dec. 98.

DAMAGES MAY BE RECOVERED FOR EXPULSION from train, when riding under directions and representations of ticket-agent: *Murdock v. Boston etc. R'y Co.*, 137 Mass. 293; 50 Am. Rep. 307; *South and North etc. R'y v. Huffman*, 76 Ala. 492; 52 Am. Rep. 349.

PEOPLE v. DE FORE.

[64 MICHIGAN, 693.]

CRIMINAL LAW. — OBJECT OF ASSIGNMENTS OF ERROR IS TO POINT OUT SPECIFICALLY what is relied upon as error, and this is accomplished by an assignment which, in terms, assigns error upon the refusal to give each and every one of defendant's requests to charge.

ASSIGNMENT OF ERROR WHICH IS TOO GENERAL cannot be considered.

WHERE TESTIMONY IN CRIMINAL PROSECUTION FOR SEDUCTION SHOWS NO OTHER INDUCEMENT or motive than a promise of marriage, except it might be the mutual desire of the parties, to which the court called the jury's attention, charging that if such was the motive the respondent was not guilty, a request to instruct the jury that, if they find from the evidence that there was any other inducement or motive which led the prosecutrix to submit herself to the respondent except the promise of marriage, they should find him not guilty, is properly refused.

OFFENSE OF SEDUCTION CREATED AND PUNISHABLE BY MICHIGAN STATUTE IS COMMITTED if the man has carnal intercourse to which the woman assented, if such assent was obtained by a promise of marriage made by the man at the time, and to which without such promise she would not have yielded.

ACT OF INTERCOURSE INDUCED SIMPLY BY MUTUAL DESIRE of the parties to gratify a lustful passion does not constitute the crime of seduction.

CRIME OF RAPE IS NOT EMBRACED IN THAT OF SEDUCTION, and it would be improper, in a trial for seduction, to instruct the jury upon the law relative to the former crime. But the judge should instruct the jury, in a trial for seduction, that if the prosecutrix did not assent to the act of intercourse, the offense was not committed.

IN CRIMINAL PROSECUTION FOR SEDUCTION, WEIGHT OF EVIDENCE AND CREDIT TO BE GIVEN to testimony of the prosecutrix are questions exclusively for the jury, and it is error for the court to charge that they

should consider any facts testified to by her as established simply because she had testified to them, and had not been contradicted.

IT IS DUTY OF TRIAL JUDGE IN CRIMINAL CASE TO INSTRUCT JURY IN REFERENCE to the presumptions of law applicable to the case before them, distinguishing those which are conclusive from those which are disputable.

PRESUMPTION OF INNOCENCE IS PRESENT IN EVERY CRIMINAL CASE, and the jury should be instructed to that effect, and that such presumption stands good until overcome by evidence which convinces them beyond a reasonable doubt that the respondent is guilty.

Cruickshank and Grier, for the respondent.

Moses Taggart, attorney-general, for the people.

CHAMPLIN, J. Respondent was convicted of the crime of seduction. But one act was charged or claimed to have been committed, and that the prosecutrix swore was under a promise of marriage. No attempt was made to show that she was not a woman of previous chaste character. On her direct and cross-examination, she testified to the use of considerable force by respondent before he accomplished his purpose, and said she would not have consented if she could have prevented it. Her testimony given on cross-examination before the justice, signed by her, was produced and identified by her, and was introduced and read to the jury, as follows: "I did not consent to his doing that to me, and would not, only he held me so tight I could not help it. I would not have said anything about this matter, or made Peter any trouble, only I found I was in a family way. If it had not been for that, I would have let him go where he liked."

The counsel for defendant requested the circuit judge, in writing, to charge and instruct the jury as follows:—

"1. If the jury find, from the evidence, that there was any other inducement or motive which induced or led the prosecutrix to submit herself to the defendant, except the promise of marriage, then the jury cannot convict the defendant of seduction.

"2. To convict the defendant of seduction, the jury must find two facts, viz.: 1. That the prosecutrix consented to the act of copulation with the defendant freely and willingly; 2. That she was induced to thus consent by reason of a promise of marriage made by defendant prior to the act of connection.

"3. If you find, from the evidence, that she submitted to the act of connection unwillingly, or through force or fear of defendant, the jury cannot convict the defendant of seduction.

"4. If the jury find, from the evidence, that the prosecutrix submitted herself to the defendant partly because of a promise of marriage, and partly through force or fear of defendant, then the jury cannot convict the defendant of seduction.

"5. The jury must find, from the evidence, before they can convict the defendant of seduction, that there was a promise of marriage between the defendant and prosecutrix, made prior to the act of connection, and that said promise was understood and relied upon by her, and that she yielded to the act with defendant because of said promise, and did so freely and with full consent.

"6. If the jury find, from the evidence, that the prosecutrix would not have submitted herself to have connection with defendant on the sixteenth day of November, 1884, without the force used by defendant, as testified to by her, then the jury cannot convict the defendant of seduction.

"7. If the jury find, from the evidence, that the act was done against the will and wishes of the prosecutrix, then the jury cannot convict.

"8. In order to convict the defendant of seduction, the jury must find, from the evidence, a promise of marriage made by the defendant to the prosecutrix, and in consideration of such promise she freely and willingly consented to have connection.

"9. If the prosecutrix was compelled by force or fear of defendant, in whole or in part, to submit to the act of connection, then the act would not be seduction, and the jury cannot convict."

The circuit judge declined to so instruct the jury, and on his own motion charged and instructed them as follows:—

"Gentlemen of the jury: This action is brought by the people against the defendant under the provisions of the statute which provides for the punishment of any man who shall seduce or debauch an unmarried woman. In this case, the defendant is charged with having seduced and debauched the complaining witness, Nettie Josephack, on the sixteenth day of November, 1884, in the township of Jordan, in this county. The testimony on which the people rest is the testimony of the complaining witness. Her testimony stands before you uncontradicted by any other witness in the case. You, therefore, have no conflict of testimony to reconcile, except it be conflicting statements of the complaining witness. The fact that the complaining witness and the defendant had sexual

intercourse on that day, in that township, is not disputed; and you may take that fact as established in examining this case. The question for you to determine then is, What were the inducements that led to this sexual intercourse? They may be, or they may have been, occasioned in three ways:—

“1. It may have been from the mutual desire of the parties, without undue influence of either, to gratify their passions. In that case, if you should find such was the case, then your verdict will be, ‘Not guilty.’

“2. It may have been by the seductive influence of the defendant. But the complaining witness has testified to no acts in that line except the promise of marriage. Therefore, in order to convict this defendant of the offense here charged, under the testimony before you, you will have to find that the inducement which led to her submitting her person to the carnal intercourse of the defendant was the fact that he, for that reason, promised to marry her. If you find that that was the reason of her submitting to his embrace, then your verdict will be, ‘Guilty.’

“3. If you should find, from the testimony in the case, that she gave no consent whatever, that the intercourse was obtained by force and compulsion,—such an obtaining of carnal intercourse with a woman is rape, and it is a higher crime than the one you are brought here to consider. It would be against public policy to allow a prosecuting officer to bring a charge of seduction where the crime was rape, because, if the law allowed him to do so, he might allow parties to escape with a light punishment, where state’s prison for a long term of years was the punishment that should be meted out for that offense.

“The crime of rape consists of, or is defined by Bouvier to be, ‘A carnal knowledge of a woman by a man, forcibly and unlawfully, against her will.’ Therefore, to find that this man committed a rape on this woman, you will have to find that he committed that ‘forcibly and unlawfully, and against her will.’ If she consented to the connection, it was not rape.

“Therefore, gentlemen, I think that you will, in this case, have but two matters to consider. I think you may dispense with any theory that this defendant committed the higher crime of rape, under the testimony in the case; and you will be left simply to determine whether it was by the mutual consent of the parties, resulting from long acquaintance, and the very intimate relation that existed between them, upon a con-

tract of marriage before entered into, or whether it was upon a promise at that time of a future marriage on condition that she would submit to his embraces. If you find the former, he is not guilty; if you find the latter, your verdict will be, 'Guilty.'"

The errors assigned upon this record are the following: —

"1. The court erred in refusing to grant the requests submitted by defendant's counsel, and in refusing to instruct the jury as stated in said several requests; that the refusal of each and every one of said defendant's requests was error.

"2. The charge of the court, on his own motion, as a whole, was error.

"3. The court erred in that part and portion of his charge where he charges the jury in relation to the crime of rape, because the same is contrary to law, and in this case, misleading to the jury, and contrary to the evidence.

"4. The court erred in taking from the jury in his charge the consideration of the question of rape.

"5. The court erred in his charge wherein he instructs the jury as follows: 'I think you may dispense with any theory that this defendant committed the higher crime of rape.'

"6. The court erred in submitting the case to the consideration of the jury under the testimony in the case, as the evidence is not sufficient to support the verdict."

It is claimed that the assignment of error, based upon the refusal to give the nine requests to charge, is too general to be considered, and particularly as some of such requests were given, and others were improper. The object of assignments of error is to point out specifically what is relied upon as error. This is accomplished by the first assignment, which, in terms, assigns error upon the refusal to give each and every one of defendant's requests. This applies to each request separately; and no good reason is perceived for repeating each request in the assignments, which would only tend to prolong the record without lending any perspicuity to the errors assigned. The second assignment of error is too general, and cannot be considered.

The first request to charge was properly refused in the form in which it was asked. The testimony showed no other inducement or motive than a promise of marriage, except it might be the mutual desire of the parties; and this the court called the jury's attention to, and told them, if they found that the act was done by the mutual consent of the parties to

gratify their passions, the respondent was not guilty. The second request was covered substantially by the charge as given, as was also the eighth.

The third and sixth requests were properly refused. The respondent was on trial for the offense created by the statute of seducing and debauching an unmarried female. Under this statute, the offense is committed if the man has carnal intercourse to which the woman assented, if such assent was obtained by a promise of marriage made by the man at the time, and to which, without such promise, she would not have yielded: *People v. Millspaugh*, 11 Mich. 278, 282, 283. The offense consists in enticing the woman from the path of virtue, and obtaining her consent to the illicit intercourse by promises made at the time. The evidence should be such as to satisfy the jury, beyond a reasonable doubt, upon these points. The promise and yielding her virtue in consequence thereof is the gist of the offense. If she resists, but finally assents or yields, induced thereto or in reliance upon the promise made, the offense is committed: *Boyce v. People*, 55 N. Y. 644.

An act of intercourse induced simply by mutual desire of the parties to gratify a lustful passion would not constitute the crime charged in the information. The charge of seduction and debauchery implies that a pure woman will resist, and that the natural sentiment of virtue and of purity will be overcome by promise of marriage and other means, and submission to his desires finally obtained through such inducements. And it has been held that, when the female submitted through a promise of marriage conditioned upon the act resulting in pregnancy, the crime was committed: *People v. Hustis*, 32 Hun, 58; *Kenyon v. People*, 26 N. Y. 203; 84 Am. Dec. 177. The requests last referred to leave out of consideration the concurrent influence of the promise of marriage as a producing cause of yielding assent, or, to use the language of the request, in submitting to the act.

The fourth and ninth requests were properly refused. The crime of rape is not embraced in that of seduction; and it would be improper for the judge, upon a trial for seduction, to instruct the jury upon the law relative to the crime of rape: *Reynolds v. People*, 41 How. Pr. 179.

The judge, however, should charge that, if the jury should find that she did not assent to the act of intercourse, the offense was not committed. The respondent was entitled to

have his seventh request given. This request is not covered by the charge of the court, which was finally reduced to two propositions; namely, whether the act was done by the mutual consent of the parties, or whether it was upon a promise at that time of a future marriage on condition that she would submit to his embraces. He withdrew from the jury whether she gave no consent whatever, and the intercourse was obtained by force and compulsion. For this error assigned, the conviction must be set aside, and a new trial ordered.

It may be well, as there must be a retrial, to point out one or two errors in the charge not specifically assigned as error.

The attention of the jury was called to the fact that the people rested their testimony upon the testimony of the complaining witness, and that her testimony stood before them uncontradicted by any other witness in the case. He also told the jury that the fact that the complaining witness and the defendant had sexual intercourse on that day, in that township, was not disputed; and the jury might take that fact as established in examining the case. This was erroneous. The weight of the evidence, and the credit to be given to the testimony of the complaining witness, was a question exclusively for the jury, and it was error for the court to charge the jury that they should consider any facts testified to by her as established, simply because she had testified to them and had not been contradicted. These facts which he directed the jury to regard as established were a part of the *res gestæ*. The law presumed the respondent innocent of the crime charged until such presumption was rebutted and overcome by evidence; and the jury must weigh this presumption against her testimony, and ascertain what the facts are. Her testimony may have been of such a character or so contradictory as not to obtain any credit with the jury. Indeed, the judge told the jury that they had no conflict of testimony to reconcile except it was the conflicting statements of the complaining witness.

Another error in the charge appears. It is the duty of the trial judge, in a criminal case, to instruct the jury in reference to the presumptions of law applicable to the case before them, distinguishing those which are conclusive from those which are disputable. The presumption of innocence is present in every criminal case; and he should instruct the jury to that effect, and that it stands good until overcome by evidence which convinces the jury, beyond a reasonable doubt,

that the respondent is guilty. The charge of the court entirely overlooks this presumption, and nothing was said upon the subject.

Let an order be entered reversing the judgment, and granting respondent a new trial.

CRIME OF SEDUCTION AS DEFINED IN THE AMERICAN STATUTES. — Seduction as a criminal offense is discussed, generally, in a note of considerable length appended to the case of *State v. Carron*, 18 Iowa, 372; 87 Am. Dec. 401, 405-411. Statutes defining the offense of seduction, and providing for its punishment, vary in their phraseology in the different states, rendering a uniform definition impracticable. But a number of recent decisions bearing upon the elements of the offense will be here given, in connection with the principal case, and intended to be supplementary to the note referred to above.

In Alabama, the statute declares that "any man, who, by means of temptation, deception, arts, flattery, or a promise of marriage, seduces any unmarried female in this state, shall be deemed guilty of a felony," etc.: Ala. Code 1876, sec. 4188; Sess. Acts 1880-81, p. 48. The essential elements of the offense thus described by the statute are: 1. The woman must be unmarried; 2. She must be induced to a surrender of her chastity by a promise of marriage, or by the arts or deception of the man: *Wilson v. State*, 73 Ala. 527. These are two of the elements of the offense which, to authorize conviction, must be shown with that measure of proof requisite in criminal cases. The promise of marriage, arts, or deceptions, as the case may be, must sustain the relation to the accomplished purpose as cause to effect, or the case is not brought within the statute: *Carney v. State*, 79 Id. 14; *Cunningham v. State*, 73 Id. 51.

Under the Arkansas statute, the offense of seduction consists in having illicit connection with an unmarried female, who yields to the solicitations of her seducer under the inducement of a promise of marriage, and it may be committed by an infant upon an infant, if they have reached the age of puberty: *Polk v. State*, 40 Ark. 482; 48 Am. Rep. 17. And sexual intercourse may be inferred from circumstances, opportunities, and the relations and conduct of the parties: *Polk v. State*, 40 Ark. 482; 48 Am. Rep. 17. Corroborating evidence of the promise of marriage is required: *Polk v. State*, 40 Ark. 482; and so in Missouri: *State v. Hill*, 91 Mo. 423. In the latter state the good reputation of the prosecutrix is made by the statute an element of the offense, and it is proper for the state to prove that fact, in making out its case: *State v. Patterson*, 83 Id. 88; 57 Am. Rep. 374; *State v. Hill*, 91 Mo. 423. The promise to marry may be implied from the language used, and whether the prosecutrix is sufficiently corroborated is a question for the jury: *State v. Brinkhaus*, 34 Minn. 285. Generally, in order to establish a charge of seduction, it must be made to appear that the intercourse was accomplished by some artifice or deception; and it is held that something more than a mere appeal to the lust or passion of the woman must be shown before the law will inflict the penalty prescribed for that crime, or afford her a remedy: *Baird v. Bochner*, 72 Iowa, 318; *State v. Fitzgerald*, 63 Id. 268; *Hawn v. Banghart*, Sup. Ct. Iowa, 1888.

In a prosecution under the Indiana statute, for the seduction, under a promise of marriage, of a female minor, it must be shown that the intercourse took place subsequent to the promise of marriage, and that such

promise was the inducement to the intercourse: *Phillips v. State*, 108 Ind. 406.

The North Carolina statute provides "that any man who shall seduce an innocent and virtuous woman under promise of marriage shall be guilty of a crime," etc.: Acts of 1885, c. 248. It is held that this statute plainly contemplates a seduction brought about by means of a promise of marriage in the nature of a deceit; and consent, if seduction be proved, is no defense to an indictment under the statute for seduction under promise of marriage: *State v. Horton*, 100 N. C. 443; 6 Am. St. Rep. 613.

To constitute the offense of seduction under the Texas statute, the female must, at the time of the commission of the act, be unmarried: Tex. Pen. Code, art. 814; and if the indictment for seduction fails to allege that the female seduced was unmarried, at the time of the commission of the act, it charges no offense against the laws of that state: *Mesa v. State*, 17 Tex. App. 395.

In many of the states, the statute provides that the female shall be "of previous chaste character": See *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177, and note 181, 182, in which the meaning of the words "previous chaste character" is discussed; see also *State v. Brinkhaus*, 34 Minn. 285; *State v. McClintic*, 73 Iowa, 663. And it is held that, under such a statute, the character of the prosecutrix may be impeached by proof of specific acts of lewdness: *Kenyon v. People*, 26 N. Y. 203; 84 Am. Dec. 177; *People v. Clark*, 33 Mich. 112; *Polk v. State*, 40 Ark. 482; 48 Am. Rep. 17. So under the Missouri statute, which provides that the female shall be "of good repute," on the trial of an indictment for seduction, evidence of previous acts of lewdness and unchastity by the complainant with other men is admissible: *State v. Wheeler*, 94 Mo. 252; *State v. Patterson*, 88 Id. 88; 57 Am. Rep. 374; overruling *State v. Branfield*, 81 Mo. 151; 51 Am. Rep. 234. There is held to be no such difference between the expressions "previous chaste character" and "good repute" as to call for any variation of the rules of evidence in the respect under consideration: *State v. Hill*, 91 Mo. 423. On the other hand, the Kansas statute uses the words "good repute," and it is held to be incompetent for the defendant on trial for the offense charged in the statute to prove particular acts of unchastity, or specific acts of illicit intercourse, by the prosecutrix with other persons: *State v. Bryan*, 34 Kan. 63. The same is held under the Ohio statute, which also employs the words "good repute" in respect to the female: *Bowers v. State*, 29 Ohio St. 542. But in prosecutions for seduction under the Georgia statute, which provides that "any person who, by persuasion and promise of marriage, or by other false and fraudulent means, shall seduce a virtuous unmarried female," shall be punished, etc., it is admissible to introduce in defense evidence which falls short of actual sexual guilt, but which shows that the prosecutrix was corrupt in morals and unchaste in mind prior to the offense charged, and therefore could not have been seduced, corrupted, or drawn aside from the path of virtue: *Wood v. State*, 48 Ga. 192; 15 Am. Rep. 664. But evidence that the prosecutrix had frequently been seen going home with another man is not a material circumstance, even to contradict the testimony that she had never "kept company" with any other man than the defendant: *State v. Payson*, 71 Iowa, 542.

The essential elements of the offense of seduction, under the New Jersey statute, are: 1. The defendant must be a single man, over the age of eighteen; 2. The female must be a single woman; 3. She must be under the age of twenty-one; 4. She must be of good repute for chastity; 5. The sexual inter-

course must have been had under a promise of marriage; 6. She must thereby become pregnant; 7. The evidence of the female must be corroborated to the extent required in case of indictment for perjury. The presence of each and all of these elements is necessary to conviction, and the absence of any one of them is fatal to the prosecution: *Zabriskie v. State*, 43 N. J. L. 640; 39 Am. Rep. 610. It is held that the state must prove the good repute of the prosecutrix affirmatively, and that it will not be presumed: *Zabriskie v. State*, 43 N. J. L. 640; 39 Am. Rep. 610; and see *State v. Hill*, 91 Mo. 423; *Commonwealth v. Whittaker*, 131 Mass. 224. But the rule is otherwise in some of the states, and in a prosecution for seduction, the chaste character of the prosecutrix is presumed until assailed as a matter of defense, and the burden of proof is then upon the defendant: *State v. Curran*, 51 Iowa, 112; *State v. McClintic*, 73 Id. 663. Direct and positive corroborative evidence of the promise to marry is not required, but simply such facts and circumstances as fairly tend to support the evidence of the prosecutrix, and satisfy the jury that she is entitled to credit: *State v. Brinkhaus*, 34 Minn. 285. Evidence of circumstances which usually accompany the marriage engagement has been held sufficient to satisfy the statute as to the corroborating evidence: *State v. Hill*, 91 Mo. 423. To corroborate the evidence of the prosecutrix as to the seduction, evidence of a long courtship is competent, but not conclusive: *State v. Curran*, 51 Iowa, 112; and see *State v. Wells*, 48 Id. 671. The exact time of the seduction is never material in a prosecution for the offense, and it is not therefore essential that the prosecutrix should be corroborated as to the exact day: *State v. McClintic*, 73 Id. 663. Upon the trial of the defendant for seduction under promise of marriage, it is proper to admit evidence of the fact that a child was born, to show the fact of seduction: *Hausenstuck v. Commonwealth*, 13 Va. L. J. 134 (Va. Ct. of App.). Nor is it error to exhibit the child to the jury to enable them to trace resemblance to the alleged father, as corroborative of the fact of sexual connection between the parties, and thus only to be considered by the jury: *State v. Horton*, 100 N. C. 443; 6 Am. St. Rep. 613, and note 618.

A woman's reputation for chastity is the general credit for chastity which she bears among her neighbors and acquaintances; and if the latter say nothing of her, or do not question her character for chastity, her reputation in this regard should be considered good: *State v. Bryan*, 34 Kan. 63. Therefore, in a prosecution for seduction, the negative evidence of a witness "that he never heard anything against the character of the woman for chastity," on whose behalf he had been called, is admissible upon the trial, where the reputation of the woman for chastity is in question, and it is strong evidence of the woman's good repute: *State v. Bryan*, 34 Id. 63; citing 1 Wharton on Evidence, sec. 49; *Gandolfo v. State*, 11 Ohio St. 114; and see *State v. Lee*, 22 Minn. 407.

PEOPLE v. DOW.

[64 MICHIGAN, 717.]

CRIMINAL LAW — EVIDENCE. — ON SEPARATE TRIAL OF ONE OF TWO RESPONDENTS JOINTLY INFORMED AGAINST for burglary, the testimony of a witness to a conversation had with the respondent not on trial, soon after the burglary, in the presence and hearing of his co-respondent, during which both the respondents gave the witness money with which to buy railway tickets to Rochester, New York, and in which the respondent not on trial said he did not wish to buy the tickets for fear of arrest as a suspicious character, is competent and admissible, the respondent on trial being equally interested with the other in the purchase and use of the tickets.

CONSTITUTIONAL PROVISION THAT PARTY ACCUSED SHALL HAVE RIGHT TO BE CONFRONTED with the witnesses against him does not apply to the proof of facts in their nature essentially and purely documentary, and which can only be proved by the original, or by a copy officially certified.

IN MICHIGAN, MARKET REPORTS, AND RECORDS OF THE WEATHER as kept at the asylum at Kalamazoo, are competent evidence in civil cases.

RECORD KEPT BY OFFICER IN CHARGE OF SIGNAL-SERVICE STATION is not admissible in evidence, on a trial for burglary, to show the condition of the weather on the night in question, without calling as a witness the one who made the observations and the record, to testify to their correctness.

George X. M. Collier and E. S. Grece, for the respondent.

Moses Taggart, attorney-general, for the people.

MORSE, J. The respondent was tried and convicted, in the recorder's court of the city of Detroit, of burglary.

On the night of the 26th of April, 1886, about three o'clock in the morning, the house of John B. Moloney, in the city of Detroit, was broken into and entered, and several articles stolen therefrom, among them a gold watch and chain.

The evidence against the respondent tended to show him in company with Thomas Powers that evening and early next morning, and with him at one place where Powers attempted to dispose of the watch stolen from Moloney's residence, and also at one Rosenberg's, where Powers sold the watch.

George Marrow testified that he met Powers and Dow on Woodward Avenue, and went to a saloon, where Powers asked him to buy a couple of tickets to Rochester, New York, in the presence of Dow, and said that he did not want to go down town because he was afraid he would be arrested; that he had been arrested in Detroit once before, and was afraid he would be arrested again as a suspicious character, but they could n't do anything with him but hold him for a couple of

days, and he wanted to buy the tickets for that week. Both the respondents gave him money, fifteen dollars in all, and Marrow took it, and went and purchased the tickets. Met Powers and Dow at a saloon afterwards, where arrangement had been made to meet, and gave them the tickets.

This testimony as to what Powers said was objected to as incompetent as against Dow, who was having a separate trial. The evidence was competent. The occurrence was soon after the burglary, and Dow seems to have been equally interested with Powers in the purchase of these tickets, and the use of them. He was arrested at Rochester. The conversation was in his presence and hearing, and therefore admissible.

The main objection and exception relates to the admission in evidence of the official record of the weather, as kept in the office of N. B. Conger, signal officer in charge of the signal service station at Detroit.

Mr. Conger was offered as a witness, and testified that he kept a record of the weather in his office, and had the official record with him. He was then asked to state the condition of the weather on the evening of April 26, referring to such record. It was objected to as incompetent. Objection overruled. He then testified it was not in his handwriting, but was taken under his supervision. The fact of the record not being in the handwriting of the witness was then made the basis of another objection to its reception in evidence. The court, after some hesitation, allowed the record to be put in evidence.

On cross-examination, it appeared that the witness left the signal office at six o'clock in the evening, and did not return until the next morning. When he went away, he left his assistant, Mr. Baldwin, in charge of the office. Did not know of his own knowledge that Baldwin or the other assistant remained in the office all night, but supposed one of them did. According to this record, the night of the 26th rain commenced, by meridian time, at 7:10, P. M., and ended at 9:30, P. M., and then commenced again at 9:51, P. M., and stopped at 11:45, P. M. On the 27th, beginning at seven, A. M., the weather was clear. No observations were taken after 11:45, P. M. This evidence was introduced in rebuttal of the evidence in regard to rain by the witnesses for the defense, whose testimony tended to show an *alibi*. The following questions were put to Conger on cross-examination:—

“Q. Can you swear, of your own knowledge, that your

assistants took these observations on the night in question?

A. Yes, sir.

"Q. Of your own knowledge? A. Yes, sir; I didn't see them, of course. The observations are in their handwriting here in this original record."

The counsel for the respondent argues that this record, not being made by the witness himself, and the persons who made it not being sworn, and there being no certainty that they went outside of the office and took the observations recorded by them, is not admissible in a criminal cause. He contends that the admission of such record is in violation of the constitutional provision that the accused shall have the right to be confronted with the witnesses against him. We have heretofore held that this provision does not apply to the proof of facts in their nature essentially and purely documentary, and which can only be proved by the original, or by a copy officially certified: *People v. Jones*, 24 Mich. 225. But that is not this case. This court has also held that market reports, and the records of the weather as kept at the asylum at Kalamazoo, were properly admitted in civil cases: *Sisson v. Cleveland etc. R. R. Co.*, 14 Id. 489, 497; 90 Am. Dec. 252; *De Armond v. Neasmith*, 32 Mich. 231, 233; *Cleveland etc. R. R. Co. v. Perkins*, 17 Id. 296.

The record of the weather in this case was not one made by the witness, or one that he knew certainly to have been accurately made in accordance with the actual state of the weather. It seems to me that the presumption in favor of the correctness of this record, because it is an official one, if such presumption can be said to exist under the circumstances shown as to the manner of the observations being taken and the record being kept, cannot be used against the respondent in a criminal case. It was a vital question upon the trial whether the testimony looking towards an *alibi* was true or not, and the condition of the weather that evening was important in aiding the jury in their determination of that question.

If Conger had made the record himself, or taken the observations himself, the evidence would have been competent; but the respondent was entitled to have the testimony of Baldwin, or the assistant who took the observations and made the record of the same, and to be confronted with such witness. As it was, the presumption arising from its being an official record only saved it from being hearsay testimony. This official statement or record of the weather, though required to

be kept, and therefore an official document, is not, however, a record of facts which can only be proved by the original, or a properly certified copy. The facts therein stated are facts open to the observation of anybody, and capable of being established satisfactorily by oral testimony, or minutes kept by a private person, if such minutes refresh his recollection.

The record ought not to have been introduced in evidence without the presence of the man who made the observations and the record on the stand, so that the accuracy of such record could have been inquired into.

For this error, the judgment must be reversed, and a new trial granted.

EVIDENCE — ACCOMPLICES. — When common design between two defendants is first proved, declarations of either in relation to their joint undertaking are admissible against both: *Commonwealth v. Tivnon*, 8 Gray, 375; 69 Am. Dec. 248. Confessions or declarations of accomplice made after commission of offense are evidence against himself alone, unless made in the presence of his partner in crime: *Hunter v. Commonwealth*, 7 Gratt. 641; 56 Am. Dec. 121. Admissions of co-defendant having joint interest in a suit are evidence against all: *Hurst v. Robinson*, 13 Mo. 82; 53 Am. Dec. 134. Also see *Trimble v. Turner*, 13 Smedes & M. 348; 53 Am. Dec. 90; *Stovall v. Farmers' etc. Bank*, 8 Smedes & M. 305; 47 Am. Dec. 85; *State v. Soper*, 16 Mo. 293; 33 Am. Dec. 665.

KELLY v. MICHIGAN CENTRAL RAILROAD COMPANY.

[65 MICHIGAN, 186.]

NEGLIGENCE IS IN LAW A RELATIVE TERM, and implies the non-observance of or omission to perform a duty which is prescribed by law, or it arises from the situation of the parties and circumstances surrounding the transaction.

RAILROADS. — STAKING OF CARS ACROSS HIGHWAY IN THE RAILROAD COMPANY'S YARD IS NOT AN UNLAWFUL ACT, nor is it negligence *per se*.

RAILROAD — HIGHWAY-CROSSINGS. — Right of public in a highway crossing a railroad is simply a right of passage across the railroad. The highway-crossing is for the purpose of passage from one side of the railroad to the other, and any other use thereof, whether between the tracks or between the rails, is unwarranted.

TRESPASSER ON RAILROAD TRACK. — One entering upon or traveling along the right of way of a railroad company is a trespasser, and does not cease to be such when he has reached a point where such right of way is intersected by a public street; and the company owes him no higher care or duty at such intersection than at other points along its railroad. He therefore cannot recover for injuries sustained at such intersection from a car which is being staked along the track in such right of way.

CASE to recover compensation for injuries sustained by the plaintiff.

Henry Russel and Ashley Pond, for the appellant.

E. T. Wood and Levi T. Griffin, for the plaintiff.

CHAMPLIN, J. On the twenty-seventh day of December, 1881, plaintiff was in the employ of the Detroit Car Wheel Company, whose shops are situated near to the western limits of Detroit, and adjoining the railroad tracks of defendant. There are not less than six railroad tracks between the car-wheel company's shops and the depot of the defendant company in the city, and at some points a great many more. There are manufacturing institutions located along defendant's right of way on either side, and spur-tracks leading thereto, all making up the necessary terminal, transfer, and local yard of the defendant in the city of Detroit.

Vinewood Avenue is a public street, laid out and opened across defendant's right of way, and runs nearly north and south, and is several rods east of the Detroit Car Wheel Company's shops. There are also other streets crossing defendant's right of way. Laborers who work at the different manufactories have been in the habit of entering upon defendant's right of way, and traveling thereon to and from their places of work, but not with defendant's consent. Defendant caused to be erected signs at each street-crossing, with a notice containing these words:—

"No thoroughfare. The public are warned against walking on these tracks."

Plaintiff testified: "I knew that an effort had been made to stop people from walking on the tracks. I was told that at one time they put people on crossings to stop people from walking on the tracks. I don't know that they put up these signs after that, but I have seen them since. Up to that time I had not seen them.

"Q. You knew that these men were put upon these crossings to keep people from walking up and down those tracks? That was what they were there for, as you have heard, was it not? A. Yes, sir; they had to warn people.

"Q. What you were told was this: that they put men there to stop people from walking up and down and along the tracks, was it not? A. Well, I was told that they were there to stop people from walking on the tracks, and to see that

people would cross there safely; and, if they could not stop them, they let them go,—let them take their chance.”

Plaintiff was familiar with the premises, and knew that they were used by defendant as a yard for switching cars; that the switching-engines passed frequently, changing and moving cars, and that through-trains passed over the tracks, and that a person walking upon the tracks or between was liable to meet or be overtaken by an engine or train at any moment. He also had seen the defendant company, in moving cars, use what is called a “stake,” and knew that in doing business they pursued that method of handling cars.

On the 27th of December, 1881, the plaintiff started from his house, which was south of the railroad, to go to his work. It was about six o'clock in the morning, and still dark. In doing so he went upon the defendant's right of way at a point about a mile east of the shops where he worked, and started to walk out between the railroad tracks. He walked west a distance of a quarter to half a mile; and, when at the crossing of Vinewood Avenue, he was struck by a stake extending from an engine approaching him on the track south of him to some freight-cars on the track north of him, which were being staked east, and was knocked down and very severely and permanently injured. He saw the engine and cars approaching him, but did not see the stake, and attempted to pass between, and met with the accident, as before stated. He was not using Vinewood Avenue as a highway, nor was he traveling along it, but he intended to keep on upon the defendant's right of way to the shops where he was employed. His meeting the engine at that particular point was a mere coincidence.

The court instructed the jury that upon these facts, in the absence of contributory negligence, the plaintiff was entitled to recover; that staking cars across a public highway was illegal, and rendered the defendant liable for any injury occasioned thereby within the limits of such highway-crossing, and it was of no consequence whether the person injured was using the highway for the purpose of travel, or was traveling along the defendant's right of way without any intention to use the highway as such. He also instructed the jury that, if the accident happened without the limits of the street, the plaintiff could not recover.

I cannot accede to the views expressed in the charge of the learned judge. If the defendant would not be liable if the

accident happened outside the limits of the highway-crossing, it must be because either that there was no negligence on the part of the defendant, or if negligent, the plaintiff was a trespasser, and defendant owed him no duty, unless it was aware of his presence there, and could, by the exercise of care, avoid injuring him. But how does the railroad company become guilty of negligence the moment it crosses the line of the highway? It must be, if at all, because some new or different duty obtains from that which rested upon it before.

Negligence in law is a relative term, and implies the non-observance of or omission to perform a duty which is prescribed by law, or it arises from the situation of the parties and circumstances surrounding a transaction. There is no provision of law forbidding the staking of cars across highways in a railroad company's yard, or elsewhere. If a duty arises the non-observance of which would be negligence in defendant to stake cars across Vinewood Avenue, it must spring from the situation of the parties and the circumstances of the case. What are these? The railroad company is the owner of its right of way, and has the right of passage and of use, in the ordinary manner, of its tracks at highway-crossings. Likewise do the public have a right of way and of passage across the railroad track to be used and enjoyed in the ordinary manner. These rights are, in a sense, reciprocal, and must be exercised with a due regard to the rights of each other.

The right of the public in a highway crossing a railroad is simply a right of passage across the railroad. The public, and no individual thereof, have the right to commit a trespass upon the railroad company's property within the limits of the highway-crossing. He cannot interfere with the rails or grounds, or obstruct the tracks, simply because it is in the highway, without committing a trespass. The highway-crossing is for the purpose of passage from one side of the railroad to the other, and any other use thereof, whether between the tracks or between the rails, is unwarranted. The right of way and of use, when not used or required for the purpose of passage across the railroad, belongs to the railroad company, and may be used by it in the same manner as if no street-crossing was there.

It is not, therefore, strictly accurate to say of the plaintiff in this case that, "So long as he was on the street, he assumed only the risks which belonged to that place, notwith-

standing his design to proceed to a place which he would enter at his peril."

The plaintiff was not using the highway in the ordinary manner. He was not traveling along Vinewood Avenue, nor using the avenue for the purpose of crossing the company's right of way. He committed a technical trespass when he entered upon the defendant's right of way, and he continued such trespass from the time he entered upon it until he left it. It was one continuous act. Its nature is determined by the purpose which he says he had, — to travel over defendant's right of way until he reached the shops where he was employed. He was in the execution of this purpose, and upon defendant's right of way, when he was injured. He had no lawful right there, under the circumstances, any more than he would have had if he had been injured in the act of burglarizing a freight-car which had been left in the highway. I think the error of the trial judge was in holding that plaintiff was lawfully there, and in applying the principles to his case which would have been proper in the case of one in the lawful use of a highway crossing a railroad.

I think he also erred in holding that staking cars across a public highway was an unlawful act, and negligence *per se*. I think the railroad company owed no greater or different duty to plaintiff, under the circumstances, than it would had he been injured upon defendant's grounds west of the highway.

The judgment must be reversed, and a new trial awarded.

SHERWOOD, J., dissented from the opinion of the court, placing his ground of dissent upon the position that the plaintiff in traveling across the highway was using the avenue as a highway, and was not in any sense a trespasser; that it was as much the privilege of the citizen in using the highway in crossing it as it is his right to travel its length; and that the plaintiff's right to use the avenue was not in any way limited or impaired by what might have been his intention when he left the highway. The plaintiff, he said, did not do anything while on the avenue except to attempt to walk across it, and his right to cross it was as well secured and defined as was that of the defendant; that the defendant had no right whatever to interfere with the plaintiff's use of it for that purpose in an improper and unreasonable manner. The closing portion of his dissenting opinion is as follows: "I do not concede the doctrine that the only right the public has in a highway where it is crossed by a railroad is the simple right to cross over such railroad when an opportunity is afforded by the company so to do; but, on the contrary, I understand the public has all the rights that can be acquired in the land of an individual for the purposes of travel when it establishes a highway, and a railroad in securing the right to cross such highway obtains no more than

the right to pass over it, with its tracks and cars, in a reasonable and proper manner; that the land at the crossing upon which the tracks and trains pass may be used by the citizens and the public to such extent as may be found convenient or desirable for highway purposes and travel, so long as it does not interfere with the reasonable passage of cars, and the right of making needed repairs. It is the right of passage only for its cars that the company secures at a crossing, and not storage-ground in the street for cars. The plaintiff had a lawful right to be in the highway where he was when he was injured, and the defendant had no right to knock him down with the stake in the manner it did by its cars. While the plaintiff was between the tracks upon the highway, he assumed in traveling there the ordinary risks of both roads which belonged to that place, but nothing more; and if greater risks were cast upon him in consequence of some extraordinary doings of the company, he should have been warned of the same a sufficient length of time before reaching such dangers to enable him, with ordinary diligence, to escape. I think the learned trial judge, however, went too far in his charge when he said to the jury, in substance, that it was illegal for the defendant to use the stake; that it was negligence on the part of defendant; and upon this ground alone I concur in the reversal."

NEGLECT, WHAT IS. — NEGLIGENCE IS THE OMISSION OF CARE OR CAUTION in what we do: *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751, and note 759.

TRESPASSER ON RAILWAY TRACK. — Trespasser has no right to exact care of railroad company: *Louisville etc. R'y Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155, and note 163. But in North Carolina, although a person walking on a railroad track is technically a trespasser, yet if he uses due care to avoid injury from wrongful act of the company, he may recover damages for injuries thereby sustained: *Troy v. Cape Fear etc. R'y Co.*, 99 N. C. 298; 6 Am. St. Rep. 521, and note 529. Compare cases cited in *Sibley v. Ratliffe*, 50 Ark. 447.

RAILWAYS — LICENSE TO CROSS TRACKS. — When, for a series of years, the public has been in the habit of crossing the track of a railway company, the acquiescence of the company in the public use will amount to a license, and impose on it the duty of reasonable care with regard to those using such license: *Troy v. Cape Fear etc. R'y Co.*, 99 N. C. 298; 6 Am. St. Rep. 522. While, in a sense, right of travelers and railroad company upon a highway are equal, yet in respect to priority, that of the company is superior: *Ohio & Miss. etc. R. R. Co. v. Walker*, 113 Ind. 196. One walking upon railroad track laid in public street is not a trespasser: *Id.*; *Louisville etc. R'y Co. v. Phillips*, 112 Ind. 59.

STREETER v. WESTERN INSURANCE COMPANY.

[65 MICHIGAN, 199.]

LIFE INSURANCE POLICY DECLARING THAT IF THE INSURED SHALL DIE BY HIS OWN HAND, sane or insane, it shall become null and void, is avoided if he commits suicide while insane, unless his insanity was such that he he did not know that his act was done for the purpose of self-destruction. It matters not that he had no conception of the wrong involved in its commission.

LIFE INSURANCE. — SUICIDE CANNOT BE REGARDED AS DEATH BY ACCIDENT or from accidental causes, from the fact that it was committed while the assured was insane, and the insanity was produced or accelerated by an accidental fall or injury. Whether the injury received by the fall was the cause of the suicide was too conjectural to be submitted to the jury as a direct cause of self-destruction.

ACTION on life insurance policy. Judgment for the defendant.

Edwin F. Conely, for the appellant.

Ormond F. Hunt, and Griffin and Warner, for the respondent.

CHAMPLIN, J. The policy of insurance introduced in evidence in this cause contained the following clause: "If the insured shall, . . . within three years of the date of this policy, die by his own hand, sane or insane, . . . this policy shall become and be null and void."

Within three years from the date of the policy the insured died from the effects of a pistol-shot wound inflicted upon himself. The evidence tended to prove that when he shot himself he was insane. Witnesses expressed the opinion that his mental condition was such that he was unable to control any of his physical actions that might have been called upon to carry out any one of his impulses. It is not claimed that the self-destruction of the insured was accidental.

The court below construed the language of the policy above quoted as covering all acts of self-destruction, whether felonious or not, and was meant to excuse the company from liability when the suicide was the result of insanity, and in itself an insane act; that the words "sane or insane," in this case, not only meant to qualify the meaning of "die by his own hand," as defined by law, but that they actually do so.

Counsel for plaintiff contends that the phrase, "died by his own hand," had a well-understood signification in the law of insurance; that when the defendant insurance company selected such expression, and inserted it in its policy, it should be held to have used it in its legal sense, namely, as meaning,

"shall voluntarily and intentionally take his own life"; that by adding the words "sane or insane," the defendant had not caused the expression, "die by his own hand," to mean something which it did not mean without such addition, but had used a combined expression, which was tantamount to saying. "shall voluntarily and intentionally take his own life, sane or insane"; that if the expressions, "die by his own hand," and "sane or insane," were incongruous or inconsistent, the beneficiaries under the policy should not suffer by it; that in his opinion, however, they were not incongruous or inconsistent, but could be legally and scientifically combined, and stand together without conflict, as both voluntary and involuntary self-killing were compatible with insanity.

We are unable to agree with the construction which the learned counsel for the plaintiff places upon the clause of the contract in question. The subject is not a new one in the courts. The precise question came before the United States supreme court in *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284, where Mr. Justice Davis, in an able and exhaustive opinion, so fully reviews the subject, and the construction to be placed upon the term "sane or insane," as to render a further discussion of the subject unnecessary. It has also received attention in the following cases: *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232; *Pierce v. Travelers' Life Ins. Co.*, 34 Wis. 389; *Salentine v. Mutual Ben. Life Ins. Co.*, 24 Fed. Rep. 159; *Riley v. Hartford Life and Annuity Ins. Co.*, 25 Id. 315.

It was said by Mr. Justice Davis in *Bigelow v. Berkshire Life Ins. Co.*, *supra*, that "the policy was rendered void if the insured was conscious of the physical nature of his act, and intended by it to cause his death, although at the time he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing."

It was claimed in this case that if the insured was unconscious of the act he was committing, it was merely an accident, and was not within the intent and meaning of the terms of the policy. But the learned judge said that the term "wholly unconscious of the act" refers to the real nature and character of the act as a crime, and not to the act itself. He further said, that "Bigelow knew he was taking his own life, and showed sufficient intelligence to employ a loaded pistol to accomplish his purpose; but he was unconscious of the great crime he was committing. His darkened mind did not

enable him to see or appreciate the moral character of his act, but still left him capacity enough to understand its physical nature and consequences."

If a person does an act in a state of unconsciousness, or involuntarily, whether he be sane or insane, such act is nothing more nor less than accidental, and would not operate to forfeit the policy. The record in this case does not disclose such a state of facts. There was no evidence that the act was involuntary, or that Mower was unconscious when he inflicted upon himself the fatal wound. The only testimony which can be claimed to have any bearing upon the subject is that given in answer to questions calling for the opinion of the witnesses as to whether Mower's insane mental condition affected his ability to control his own physical actions. These witnesses did not claim to have been present at the time, or to have been acquainted with the circumstances of the transaction, but they based their opinion upon what they had observed of his mental condition previous to the act of self-destruction. Such testimony was entirely destitute of any probative quality. The court was right in disregarding it. The same point was passed upon in *De Gogorza v. Knickerbocker Life Ins. Co.*, *supra*. The policy covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane. If the act was done for the purpose of self-destruction, it matters not that the insured had no conception of the wrong involved in its commission. Upon the facts presented by this record, the charge of the trial judge was correct.

Error is assigned that the court did not permit the witness Clara M. Mower to testify in relation to conversations with Samuel C. Mower concerning his fall. This assignment is founded upon a mistake. The court did permit the witness to testify fully as to what her husband said. She testified to what complaints he made, and also to what he said.

It is also assigned as error that the court refused to permit the plaintiff to go to the jury upon the question of how far the accident alluded to in the testimony produced the condition of mind resulting in the killing. There were no requests to charge presented to the court by either party.

Some testimony was introduced tending to show that, about six weeks before the insured shot himself, he fell upon the sidewalk, and received an injury at the base of the brain; and several witnesses testified that, after that time, they

observed a marked change in his demeanor, and that he complained of pain in the back of his head, and they attributed his insanity to his fall. He shot himself April 10, 1885. But one witness, Mr. Stanely Stout, testifies to his strange and unnatural demeanor in the fall of 1884; that he never seemed to know exactly what he was about, or to have control of his faculties,—sitting silent and moody, and lingering for hours at a time, while constantly professing to be in haste. He does not remember any particular change in his manner or actions shortly before his death. So that his fall seems not to have been the producing cause of his insanity, but may have had an accelerating effect upon the predisposing cause.

Granting, however, that it was the producing cause of his insanity, and by reason of his insanity he purposely took his own life, it does not logically follow that the suicide or self-destruction was caused by the accidental fall and injury. The cause and effect are too remote and unconnected with each other. Most, if not all, cases of insanity are the result of disease either of the brain or nervous system, and such disease may in many instances be caused by accident; but what phase of insanity the diseased mental condition may assume, it is impossible to tell, or to trace to antecedent causes. In this instance, whether the injury received by the fall was the cause of the killing was too conjectural to be submitted to the jury as a direct cause of self-destruction.

The judgment of the superior court of Detroit is affirmed.

LIFE INSURANCE—DEATH BY SUICIDE, "SANE OR INSANE": See note to *Bigelow v. Ins. Co.*, 19 Am. Rep. 621–630. Condition in policy against death by one's own hand does not cover taking overdraft of whisky innocently, without suicidal intent: *Northwestern M. L. Ins. Co. v. Hazelett*, 105 Md. 212; 55 Am. Rep. 192. A policy of life insurance, conditioned to be void if insured shall die by his own hand under any circumstances, is not avoided by his suicide when insane, although he understood the act and intended the result: *Schultz v. Ins. Co.*, 40 Ohio St. 217; 48 Am. Rep. 676; *Connecticut Mutual L. Ins. Co. v. Groom*, 86 Pa. St. 92; 27 Am. Rep. 689. *Contra*, *Adkins v. Columbia Ins. Co.*, 70 Mo. 27; 35 Am. Rep. 410; *Supreme Commandery etc. v. Ainsworth*, 71 Ala. 490; 46 Am. Rep. 392. Compare *Newton v. Mutual B. L. Ins. Co.*, 76 N. Y. 426; 32 Am. Rep. 335. Policy conditioned against "death by one's own hand or act, voluntary or otherwise," is not avoided by his innocently taking a fatal overdose of medicine while sane: *Penfold v. Universal L. I. Co.*, 85 N. Y. 317; 39 Am. Rep. 660. Where, from the facts, it appears that death resulted either from accident or suicide, the legal presumption is against suicide: *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410, and note 414. Death from an overdose of laudanum, taken by mistake while in a drunken state, is not "dying by one's own hand"; but death from laudanum with intent to destroy life, though while in a drunken state, is dying

"by one's own hand": *Equitable etc. Co. v. Paterson*, 41 Ga. 338; 5 Am. Rep. 535. Suicide while insane does not avoid the policy: *Phillips v. Louisiana Eq. L. Ins. Co.*, 26 La. Ann. 404; 21 Am. Rep. 549. Policy is not avoided when suicide is committed under an insane impulse which could not be resisted: *Van Zandt v. Mut. Ben. L. Ins. Co.*, 55 N. Y. 169; 14 Am. Rep. 215. Company is not liable for death of suicide merely because he was incapable of determining whether the act was right or wrong: *Van Zandt v. Mut. Ben. L. Ins. Co.*, *supra*. In absence of proof of delirium or madness, or that act was involuntary, insurance company is not liable for death of one committing suicide by hanging himself with a rope: *Cooper v. Massachusetts L. Ins. Co.*, 102 Mass. 227; 3 Am. Rep. 451, and note 454. Suicide by insured in fit of insanity is not included in policy with condition against death by his own hand: *Eastabrook v. Union N. L. I. Co.*, 54 Me. 224; 89 Am. Dec. 743. Condition against death by one's own hand to avoid policy requires a voluntary act of self-defense, and does not contemplate death by a suicide while insane: *Breasted v. Farmers' L. & T. Co.*, 8 N. Y. 299; 59 Am. Dec. 482.

WRIGHT v. FISHER.

[65 MICHIGAN, 279.]

LACHES.—**DELAY FOR TWENTY YEARS TO TAKE ANY ACTION TO SET ASIDE A DEED** claimed to have been obtained by fraud is fatal to the complainant, though he was during all that time an habitual drunkard and spendthrift.

LACHES.—**INCOMPETENCY WHICH WILL EXONERATE COMPLAINANT FROM CONSEQUENCES OF HIS OWN LACHES** must be an incapacity of mind preventing him from realizing the nature and consequences of a fraud practiced upon him, or an incapacity of action precluding him from taking the necessary steps to right the wrong inflicted upon him. The mere fact that he loved liquor so well that he would spend all the money he could get hold of to gratify his appetite is not sufficient, if he had sober intervals during which he was possessed of mind adequate to understand his rights and to move for their enforcement.

A DRUNKARD IS NOT AN INCOMPETENT, LIKE AN IDIOT, OR ONE GENERALLY INSANE. His incompetency can only be established by showing that at the time of the act in question, his understanding was clouded, or his reason dethroned by actual intoxication.

BILL to set aside a deed for fraud. Decree for defendant.

Thomas Davies and C. I. Walker, for the appellant.

W. H. Wells, Ashley Pond, and Don M. Dickinson, for the respondent.

MORSE, J. The complainant in his bill, as amended, avers, substantially, that his father died in 1850, leaving personalty and two pieces of real estate; that complainant was then seven years of age, and was soon thereafter placed under

guardianship; six months after the death of his father, the mother of complainant married the defendant; the defendant and the widow were administrators of the estate of complainant's father; that defendant was for some years guardian over complainant, and was such guardian when he reached his majority, at which time he settled with complainant; that, a few months after complainant became of age, he was put under the guardianship of his mother as a spendthrift, on October 1, 1864; that complainant has been incapable of taking care of his property since that time; that, while so under guardianship, defendant, acting in behalf of the guardian and for himself, induced complainant to consent to the transfer of an interest in said two pieces of realty, and informed complainant that, upon such consent, the said guardian would resign, and thus enable complainant to convey said interest to her; that said guardian resigned November 14, 1865, and on November 15, 1865, while the complainant was under the influence of liquor, defendant induced him to sign a paper which, he said, would give the mother of complainant, who had been his guardian, a life estate in the two pieces of realty, and that he would be paid ten thousand dollars therefor; that complainant signed the paper upon such representations, without legal advice; that the value of the property was thirty thousand dollars; that complainant received five thousand dollars in cash, and was to receive a mortgage for five thousand dollars; that of the five thousand dollars cash, he returned to his mother shortly afterwards three thousand five hundred dollars; that he never received the mortgage, never recorded it, never received any money on it, and never discharged it; that no order of court was made authorizing the transfer; that Emily A. Fisher, the mother of complainant, died in September, 1883; that complainant had been told before her death, by her and by defendant, that the property would revert to him at her death; that the records show that the paper signed by complainant was a deed of an absolute fee of the two pieces of real estate, and that his mother sold one piece to George H. Hammond, in 1873, for over twenty thousand dollars, and one piece to defendant, July 28, 1877, for twenty-five thousand dollars, which last piece is still in defendant's name; that complainant's mother left a will, dated October 21, 1871, probated December 11, 1883, by which all her property was left to defendant, who was named as executor, and who was charged therein with the comfortable support, care, and

attendance of complainant during his life; that she left no property on her death except apparel; that defendant, by undue influence, obtained her money and property, and defeated the trust charged in the will; that defendant has paid complainant about one hundred dollars since the death of complainant's mother.

Defendant is charged with a scheme of fraud in obtaining the deed to complainant's mother from complainant, and in obtaining money and property afterwards from her. The prayer is to set aside the deeds as to piece of realty now owned by defendant.

The defendant admits many of the allegations in the bill of complaint, but denies that, while complainant was under guardianship as a spendthrift, the defendant persuaded him to consent to a transfer of an interest in the property; denies that there was any fraud in the resignation of complainant's mother as guardian, or in the procurement of the deed of the real estate to her; avers that complainant was under no disability when said deed was made, and that he knew the nature of the instrument executed; denies that he or complainant's mother misrepresented the purport of the paper, or that he persuaded complainant to return any of the five thousand dollars in cash to his mother; avers that the mortgage for five thousand dollars was received by complainant, and was afterwards paid in full and discharged; denies that the property conveyed was worth thirty thousand dollars at the time of such conveyance, and denies that complainant was without legal advice; denies that complainant was ever informed by him or by the mother that the property would revert to complainant upon her death; denies that complainant was under the influence of liquor when he executed the deed to his mother; denies that he obtained by undue influence the money and property of complainant's mother; and denies all and every charge of fraud against him.

The bill was filed May 12, 1885, in behalf of said complainant, by James W. Romeyn, his guardian, duly appointed by the probate court of Wayne County, in the superior court for the city of Detroit, in chancery.

The testimony was principally taken before a circuit court commissioner, and by depositions.

March 18, 1886, the cause was heard upon the pleadings and proofs before Hon. J. Logan Chipman, judge of said court; and June 14, 1886, a decree was entered therein dis-

missing complainant's bill, with costs. From this decree complainant appeals to this court.

The proof of the alleged fraud is confined exclusively to the testimony of the complainant and one Helen E. Spillane, a former servant in the household of the defendant.

The defense rests chiefly upon the evidence of the defendant, corroborated as to the execution of the deed by Albert H. Wilkinson, who draughted it and the other conveyance, and took the acknowledgments of the same.

We are not satisfied that the charge of fraud is made out or established by the proofs.

The complainant, by his own evidence, shows that nearly all the time since he became of age his only occupation has been the spending, in excessive dissipation, of what money and property came into his hands from his father's estate, and what he could borrow or obtain from his mother or defendant. When he could procure no money, he would pawn his clothes to obtain drink. When he had no clothes to pawn, he would resort to larceny and forgery to obtain the means to gratify his appetites. He has been in the Detroit house of correction several times. He was, however, a spendthrift rather than an incompetent. It is not shown anywhere that his mind was so impaired, at the time of the deeding of this property to his mother, that he was incapable of transacting business.

The ground of incompetency alleged and relied upon is, that he was drunk at the time, and while thus intoxicated, was not in a fit condition of mind to understand the nature of the business he was engaged in; and that, while thus stupefied and benumbed mentally by liquor, he was unduly persuaded to make the conveyance, and defrauded by the false representation that he was only conveying his interest while his mother lived, and that the whole property would revert to him at her death.

It is not shown or claimed that, at any time up to the present, the mind of the complainant has been so weakened that he is *non compos mentis*, except when under the influence of liquor. Indeed, the whole case of the complainant is based upon his testimony, which testimony in itself refutes any idea that his mind is so affected as to preclude responsibility for or knowledge of his acts when sober. The whole truth is, that his appetite for liquor is so insatiate and uncontrollable that he would barter away all he possessed in this world, and his

hope of happiness in the next, for its gratification. He is now a spendthrift when intoxicated, and is not satisfied to remain sober, and therefore needs a guardian as long as he possesses property.

But at the time the conveyance to his mother was made he was only twenty-two years of age, and the question arises as to his condition then, and the knowledge of the defendant and the mother as to his habits of life, and the probable result of his and their action in thus transferring the property from the son to the mother.

It seems undisputed that, at the attaining of his majority, he settled with his guardian, the defendant, for his share of the personal estate of his father, and was paid the sum of four thousand five hundred dollars therefor. On the 24th of June, 1864, he was paid one thousand dollars in cash, and a mortgage for three thousand five hundred dollars. He immediately plunged into dissipation, and in less than two months had squandered the whole of it.

August 30, 1864, Julius Stoll, a justice of the peace of the city of Detroit, filed a petition in the probate court for Wayne County for the appointment of a guardian over complainant, on the ground that he was a "spendthrift," and "squandering his property in such a manner, by idleness, drinking, and the keeping of the company of dissolute persons, as to expose himself to the danger of want and suffering, and the county to charge or expense for his support."

On the first of October, 1864, upon this petition, his mother was appointed guardian, executed her bond as such, and entered upon the discharge of her duties.

At the time when he arrived of age, and a settlement was made with him as to the personal estate due him from his father, it does not appear that either his mother or the defendant knew that he was not competent to manage his property. But his rapid expenditure of the four thousand five hundred dollars, and the dissipation and drunkenness developed in such expenditure, coupled with the fear that he would sell and waste the proceeds of the real estate, probably led to the proceedings instituted for the appointment of a guardian. After the appointment of the guardian, and the consequent shutting off of the means to supply his vicious propensities, the habits of complainant became much better, and he was comparatively sober, and manifested a disposition to reform his mode of living.

June 28, 1865, he petitioned the probate court for the removal of the guardian, claiming that he was capable of managing and caring for his property. Upon the hearing of this petition, the complainant's mother, aided by the defendant, who was a witness, vigorously contested this claim, and the court found that complainant was incapable of managing the property, and refused to remove the guardian.

On the 14th of the following November, complainant's mother filed a petition asking for her discharge as guardian, which petition was not contested, and was granted. On the same day, she filed in the probate court a receipt from complainant in full of all property and moneys in her hands. On the next day, the complainant executed and delivered to his mother, for a recited consideration of ten thousand dollars, a warranty deed, conveying in fee-simple all the real estate of which his father died seised to her.

From the evidence, we do not think he was intoxicated when he made this transfer, and we must also believe that he fully understood that he was conveying to her his whole title. Such is the preponderance of the testimony; and the fact that he has lived since that time in such want of money that he has pawned his clothes and committed crimes in order to obtain liquor, would seem almost conclusive that he did not think he was still possessed of the reversion of this real estate. If the conveyance had been as he now claims he supposed it was, or had he thought that the property would become his, upon his mother's death, absolutely, without reference to her wishes or will, he would have most likely bartered away or attempted to have disposed of his interest therein. And when his mother sold one parcel of the property to Hammond, in 1873, he would have been apt to have objected to the sale, or asserted in some way his title in the premises. But there is no evidence that he did so.

It is claimed by the counsel for complainant that even if the complainant was sober, and fully knew and understood the scope and purport of his deed to his mother, yet, nevertheless, the taking of such deed by the mother was a gross fraud upon him, in which fraud the defendant was an active participant, and in fact the author of it; that at the very lowest estimate, the property was worth at least fifteen thousand dollars, subject to the dower, and probably a great deal more; that his mother well knew of his unfitness to manage the money obtained from such sale to her, as did the defendant;

that, knowing this, the defendant prevailed upon complainant to deed to his mother, with the intent of subsequently acquiring the whole property to himself; that both of them used the influence they naturally possessed over his mind, which was weakened and impaired by intemperance, to unduly obtain this deed, and that the deed, procured under such circumstances, will be considered in equity fraudulent and void, and this without any evidence of actual fraud. We are inclined to believe that the amount paid by the mother to the complainant was not much, if any, below the actual value of his interest in the property at the time he transferred it to her.

We do not deem it necessary to discuss the question whether, under the circumstances, her action in buying the property, when she had reason to believe that he would squander the proceeds of such sale in dissipation and drink, was or was not a legal fraud upon complainant which a court of equity ought to redress. Nor shall we determine the effect, in that regard, of the conduct of the defendant in bringing about this sale, or his action thereafter in obtaining the property from the mother. We are not disposed, however, to find that complainant's mother intended any actual or legal fraud upon him, and doubt not that she acted throughout in the full belief that she was doing the very best she could for her son. We are not so certain in relation to the defendant. It may be that he has acted mainly for his own interest. But, without any actual fraud perpetrated upon complainant by either his mother or the defendant, we cannot grant him relief for a legal fraud because of his own laches.

As before said, he cannot be considered as an infant or an incompetent all these years. This conveyance was made in 1865. While his mother lived, and her evidence was available, he does not move in any way to redress the fraud, or assert his rights in the property. This delay cannot be excused upon the ground that he supposed he only conveyed to her a life estate. It is evident he knew that he had absolutely parted with his title. He may have expected that he would heir his mother's estate, but there is no warrant in the circumstances for the claim that he supposed that her title died with her, and the real estate became his by reversion. It is disputed by his own conduct, as well as the proofs, as heretofore shown.

He slumbered on his rights for twenty years, during which time the defendant was making valuable improvements upon

the premises in the belief that the title was secure. During all this time defendant was furnishing complainant more or less of money and clothes. Complainant always had a room and a home, if he wished it, in defendant's house. Yet the complainant made at no time in the twenty years any claim upon his mother or the defendant, or intimated that he had any title or reversionary interest in any of the real estate. Such laches would defeat the claim of complainant, if he were in the possession of a sound mind and laboring under no disability during these years.

But it is said that, if he was incompetent to manage his affairs, the delay is excused, and will not bar him of redress. But, in our opinion, the incompetency which in this case will exonerate the complainant from the consequences of his own laches, must be an incapacity of mind preventing him from realizing the nature and consequences of the fraud upon him, or an incapacity of action precluding him from taking the necessary steps to right the wrong inflicted upon him. The mere fact that he loved liquor so well that he would spend all the money he could get hold of to gratify his appetite, is not sufficient. If so, then the fact that he was so given to any other passion or appetite that he would squander all his means in pandering to it would also excuse delay.

We find no good reason in the proofs for the neglect of the complainant to assert his rights, if he had any, in this real estate. It is not shown or claimed that he was or is a lunatic, or an imbecile, but he is an habitual drunkard when the means are at hand to obtain drink, and when under the influence of liquor, he is a spendthrift. He had plenty of sober intervals, and at such times he was possessed of sufficient mind to understand his rights and to move for their enforcement. If he had the capacity, as he did, to commit forgery and larceny in order to obtain money, it would seem that he was possessed of sufficient intellect to apply to some one to right the wrong and fraud claimed to have been practiced upon him by his mother and the defendant.

A drunkard is not an incompetent, like an idiot, or one generally insane. He is simply incompetent upon proof that, at the time of the act, his understanding was clouded, or his reason dethroned, by actual intoxication: *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220; *Gardner v. Gardner*, 22 Wend. 526; 34 Am. Dec. 340; *Van Wyck v. Brasher*, 81 N. Y. 260.

The burden of proof of the fraud is upon him. As before

said, we are not satisfied but that he received from his mother a full and adequate compensation for his property. One thing is certain, he has squandered all he received from her, or any one else. It is also certain that he did not interfere for twenty years with her absolute claim of ownership to the real estate of which his father died seised, or protest in any manner against such claim, even when he knew that she was conveying the absolute title to third persons. Under these circumstances, we are loth to find fraud, and if we could, his inexcusable laches would defeat his claim for relief.

The decree of the court below is therefore affirmed, with costs.

LACHES, WHAT IS, AND WHAT ARE VALID EXCUSES FOR: See extended note to *Bell v. Hudson*, 2 Am. St. Rep. 800-808.

DRUNKENNESS. — NO DEGREE OF DRUNKENNESS WILL EXCUSE CRIME, BUT IT IS OTHERWISE with mental unsoundness produced by drunkenness, and remaining after intoxication has ceased: *Beaseley v. State*, 50 Ala. 149; 20 Am. Rep. 292.

BROWN v. METROPOLITAN LIFE INSURANCE COMPANY.

[65 MICHIGAN, 306.]

LIFE INSURANCE POLICY MAY BE AVOIDED FOR FALSE ANSWERS WRITTEN BY THE AGENT OF THE INSURANCE COMPANY, after leaving the presence of the assured, in an application signed in blank, if the answers so written conform to those actually made by the applicant.

LIFE INSURANCE. — IF ANSWERS ARE WRITTEN IN APPLICATION FOR INSURANCE BY AGENT OF THE INSURER WITHOUT THE KNOWLEDGE or consent of the applicant, the company is precluded from any defense based on the falsity of such answers.

LIFE INSURANCE. — ANSWERS OF APPLICANT FOR INSURANCE OUGHT TO BE CONSTRUED LIBERALLY in his favor.

LIFE INSURANCE. — QUESTION TO APPLICANT REGARDING "ATTENDANCE BY PHYSICIAN" should be construed as meaning attendance upon the applicant for some disease or ailment of importance, and not for an indisposition trivial in its nature, and such as all persons are liable to who are yet considered to be in sound health generally.

LIFE INSURANCE. — FALSE ANSWERS TO QUESTIONS REGARDING HEALTH OF APPLICANT will avoid policy of insurance, though in a prior application to the same insurer for other insurance, different and correct answers were made to the same question. The insurer is not bound to take notice of the answers given in the prior application.

LIFE INSURANCE. — THE TERM "SOUND HEALTH," WHEN USED IN QUESTIONS IN APPLICATIONS for life insurance, means a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, not a mere temporary indisposition which does not tend to weaken or undermine the constitution of the assured.

EVIDENCE. — CONVERSATION OF PHYSICIAN WITH MOTHER OF THE ASSURED is not competent evidence for the purpose of showing the latter's state of health.

EVIDENCE. — PHOTOGRAPH OF ASSURED IS NOT COMPETENT EVIDENCE for the purpose of showing his healthy appearance.

EVIDENCE. — PHYSICIAN IS NOT PRECLUDED FROM ANSWERING the question as to whether or not he had ever treated the assured for a specified disease, such as typhoid fever.

INSURANCE. — PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT ANSWERS WRITTEN BY AN INSURANCE AGENT in an application which had been first signed in blank were incorrectly written by the agent, and were not the true answers made by the assured.

EVIDENCE. — TESTIMONY OF A PHYSICIAN IN RELATION TO WHAT AN APPLICANT FOR INSURANCE SAID ABOUT HAVING A PARTICULAR DISEASE, and the physician's conclusion from such examination, and his statement in his written report thereof, are admissible as tending to prove that the applicant was free from the disease in question.

ASSUMPSIT on life insurance policies. Judgment for plaintiff.

Edmund Haug, for the appellant.

James A. Randall and John Atkinson, for the respondent.

MORSE, J. Plaintiff brought *assumpsit* in the Wayne circuit court upon two policies of insurance in the defendant company, executed to Mercy Victoria Brown, and payable at her death to plaintiff,—one for the sum of five hundred dollars, dated March 12, 1883; and one for the same sum, dated May 26, 1884.

Mercy Victoria Brown died on the fourth day of February, 1885.

A written application was made for each insurance. The defendant claimed that certain statements in said applications, and warranted to be true, were false, and avoided the policies.

In the court below the plaintiff recovered a judgment for \$886.79.

The second policy provided that only two thirds of the sum insured should be paid.

Upon the first policy it was claimed by the defendant that the answers to the following questions in the application were untrue:—

“Q. 15. When last sick? A. Nine or ten years ago.

“Q. 16. Of what disease? A. Typhoid fever.

“Q. 17. Name of physician who last attended life proposed, and when? A. Dr. Henderson; nine or ten years ago.”

It was claimed by the plaintiff that Mr. Wyatt, the agent

who solicited the insurance, called at the house with one of the applications (the first one), and asked a few questions. But the answers were not written down there; Mr. Wyatt stating that, because he was afraid his horse would get away, he would write out the answers at the office, and forward them to the company. The court instructed the jury that, if they found this claim to be true, and believed the testimony of plaintiff, who is the mother of Mercy Victoria Brown, the defendant company was not in a situation to claim that the answers were not true, and that in such case she would be entitled to a verdict for the amount of the first policy; and that if they did not find her testimony in this respect to be true, and found the answers not to be true, then their verdict should be for the defendant as to the first policy; but in considering the seventeenth question, and the answer thereto, they should construe the same as follows: "Name the physician who last attended for some disease"; that they should not consider any "merely personal or social call, but an attendance for sickness,—for disease."

The court also instructed the jury as to the second policy, and the application therefor, that as it appeared from the testimony that said company had knowledge, by the first application, of the fact that the answers to the last were erroneous, the defendant could not claim anything from the answers therein being incorrect.

In both applications there was a question, "Is said life now in sound health?" Answer in both, "Yes." It is claimed that these answers were untrue. The court directed the jury that, in order to find the answers to be false, they must find that the assured had some disease of a "serious" nature; that a mere temporary ailment, such as a headache, could not be considered as affecting the truth of such answers.

The counsel for the defendant claims that the testimony showed beyond contradiction that several physicians attended the assured after the time stated in her first application, and that this undisputed testimony, proving the statement in such application that she was last attended by Dr. Henderson some nine or ten years before 1883 to be false, rendered the first policy issued upon such application void.

The first question to be determined under the first policy is the correctness of the charge of the court that, if Mrs. Brown's testimony was true, the defendant could not make any defense upon the falsity of the answers in the application, for the rea-

son that they could not be considered the answers of Mercy Victoria Brown.

Mrs. Brown, the plaintiff, testified that she was present when Mr. Wyatt, as agent of the company, solicited the insurance of her daughter. He took Victoria's signature to the application, and said he would fill it out down at the office. He was at the house not over five minutes. His horse was standing at the gate, and was restless, and he was afraid it would get loose and run away. Victoria told him that she had trouble every month; that was all the trouble she had; that she was well, except once a month, when she would sometimes have a sick spell of a day or two. He did not ask her about having any kidney disease, or any other ailment or difficulty. Asked her some questions about her father and mother. He told her to sign the application, and he would take it down to the office, and fill it out. He said he could not wait; he was going to dinner, and his horse would not stand.

On cross-examination, she further stated that Wyatt asked Victoria a few questions. He asked her if she was well. She told him she was well, except one thing. He asked her "if she had had any doctor, or something; I don't know." She told him she had n't any. Does not remember whether he asked her what doctor she had, or whether any one else attended her. Her remembrance of the conversation is quite shadowy and indistinct.

Granted that Wyatt did fill out the application after he returned to the office, and yet we do not think that the evidence of Mrs. Brown warranted the charge of the court in respect to such application. It does not appear, from her testimony, beyond question that any of the answers claimed to be false were not made by Victoria at the interview at the house. If she did answer at the house as set down in the application, the fact of such answers being filled in at the office, after she signed the application, can make no material difference in the rights of her beneficiary or the company under said application, and the policy issued thereon.

The question as to whether or not she made the answers to the agent as written in the application should have been submitted to the jury. If they found that she made the answers, then their truth or falsity should have been inquired into. If she did not make them, or any of them, and they were filled in after she signed, without her knowledge or consent,

then, as to such answers so inserted, the company would be precluded from defending because of their falsity.

In relation to the answer that Victoria had been last attended by Dr. Henderson some nine or ten years ago, we can find no occasion in the testimony for the instruction of the court that "no merely personal or social call" of a physician could be considered, but it must be an "attendance for sickness,—for disease."

There could be no claim from the record before us that any of the physicians who prescribed for Victoria made any personal or social calls. It appears from Dr. Van Norman's testimony that his services were "professional," and commenced on the 16th of October, 1882, and were concluded on the 28th of May, 1883. There were fourteen consultations between those dates. She came to his office each time. He never attended her at the house. Dr. Shurley had professional visits from her at his office between May 20 and June 12, 1881, and attended her once at her home, on Lewis Street. Dr. Gilbert saw her five times in July and August, 1880, at her home. None of them stated for what ailment they treated her.

As the questions run in the application (15, 16, and 17, as heretofore given), it may be that the assured would naturally answer the seventeenth with reference to a physician attending her for some sickness or disease of more seriousness than a mere temporary ailment, such as the one indicated by her mother,—trouble with her menses. As these questions and answers ought to be construed liberally in favor of the assured, I am of the opinion that a mere calling into a doctor's office for some medicine to relieve a temporary indisposition, not serious in its nature, could not be considered an attendance by a physician within the meaning of this question, nor would the calling at the home by the doctor for the same purpose be so regarded. The jury should have been instructed that the attendance of the physician must have been an attendance upon the assured for some disease or ailment of importance, and not for an indisposition of a day or so, trivial in its nature, and such as all persons are liable to who are yet considered to be in sound health generally.

If no reference had been made by the court to the personal or social call, the instruction in this respect would have been as favorable to the defendant as it could claim under the law. We should not reverse the case because of this reference,

nowever, but, as the case must go back for the error already noted, we call attention to the remark as improper because stress is laid upon it by defendant's counsel, and it is claimed by him that it misled the jury.

In regard to second policy of insurance, Mercy Victoria Brown, as appears by the application for the same signed by her April 18, 1884, answered these same questions as follows:—

“Q. 15. When last sick? A. Never.

“Q. 16. Of what disease? A. Never.

“Q. 17. Name of physician who last attended life proposed, and when? A. No.”

We have but little evidence of the circumstances under which or how this application was obtained. The application was not, however, filled out in the handwriting of the assured. All that Mrs. Brown can remember is, that Mr. Wyatt came there to take additional insurance, and thinks Dr. Kinney was with him. Thinks they both wrote something. Don't remember any questions that were asked, or seeing her daughter sign the application.

Dr. Kinney testified to making a medical examination May 17, 1884; the only time he was ever there with Wyatt. He asked her if she had ever suffered with any disease of the kidneys, and she told him she did not think she ever had, but a doctor in New York told her that she had some disease of the kidneys. He thereupon examined her, made up his mind she had no disease of those organs, and wrote “No” after the question. In the written medical examination of Dr. Kinney, introduced in evidence, it was stated that assured never had any illness, but that she had consulted Dr. Gilbert of Detroit and Dr. Jenks of Chicago concerning herself. There was considerable evidence introduced on the part of the defendant of statements of the assured that she was afflicted with disease of the kidneys. She died from “stoppage of her menses,” as is shown by the proofs of death.

My brothers are of the opinion that, these answers being false, the court should have instructed the jury, as requested, that the second policy of insurance was void, and the plaintiff could not recover upon it. They hold that the insurance company was not bound to take notice of the answers made to the same questions in the application for the first policy, and was not precluded thereby from showing the evident untruth of the answers in the last application.

The court correctly instructed the jury as to sound health

at the time the first application was made. The "sound health" evidently meant in the application is a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, not a mere temporary indisposition which does not tend to weaken or undermine the constitution of the assured. The instruction that the disease must be of "serious nature" is objected to, and it may seem at first blush to be too strong a term to use; but it is difficult to perceive how a person can be in unsound health, or unsound condition of body or mind, without the disease that causes such condition is a serious one. If the affliction is of a permanent character, it must certainly be a serious one; and if it is merely temporary, and to pass away without serious results, it cannot well be said to render the person unsound in his general health. The word "serious" is not generally used to signify a dangerous condition, but rather to define a grave, important, or weighty trouble.

It was claimed by the defendant, and the tenor of the evidence in its behalf was to the effect, that Victoria had Bright's or some other incurable disease of the kidneys. If this were so, then she had not only a serious but a dangerous disease. The court instructed the jury that if they found the assured had any disease of a serious nature when she made the applications, the plaintiff could not recover. We think the case was fairly put to the jury in this respect.

The court did not err in excluding the testimony of Dr. Childs. He undertook to give a conversation between himself and the mother of Victoria as to her health, when he had already testified that he did not know the condition of Victoria, because he did not examine her, or have any conversation with her at all. The conversation with the mother was clearly incompetent. It was not offered to contradict or impeach Mrs. Brown, but as independent evidence of the girl's health. It could not be received for that purpose.

The photograph of the girl, Victoria, was offered to show the healthy "appearance" of the assured. This was clearly incompetent. No objection was made to its admission, but after it was received in evidence, an exception was taken. As a new trial must be had, it is not necessary to determine whether, under the particular circumstances of its use as evidence in this case, there was error. No motion was made to strike it out of the case, and it does not appear that it was

ever exhibited to the jury, or used in any way after the exception was taken.

A majority of the court think that it was error to preclude Dr. Henderson from testifying in answer to the question as to whether or not he had ever treated the assured for typhoid fever. The fact as to treatment or non-treatment for this disease was not, under the circumstances of this case, a matter of privilege upon which the plaintiff could insist.

It is further claimed that the court erred in permitting Mrs. Brown to testify to matters which varied and contradicted the written statements of the deceased, as shown by the applications. Mrs. Brown certainly had the right to show, by her testimony, that the answers made by her daughter at the house were incorrectly written in by the agent after he went to his office, or that he filled in answers at such office that were not made at the house by Victoria. As such answers, if made by the agent, and not by Victoria, or with her knowledge or consent, could not bind her, the fact that they were so made could be established by parol. If the application had not been signed until filled out, a different rule might prevail.

The testimony of Dr. Kinney, in relation to what Victoria said about having kidney disease, and his conclusion from such examination that she did not have any disease of those organs, and his so stating in his written report of such examination, was admissible as proof tending to show that she was free from any such disease.

The court did not err in refusing to direct a verdict for the defendant upon both policies, but should have instructed the jury that the second policy was void, under the evidence.

The judgment must be reversed, and a new trial granted, with costs of this court to the defendant.

LIFE INSURANCE. — Company waives forfeiture of policy, if, after knowledge of misrepresentations in application, it collects assessments on such policy: *Fitzpatrick v. Hartford L. & A. Ins. Co.*, 56 Conn. 116; 7 Am. St. Rep. 288, and note 298; *McArthur v. Home Life Ass'n*, 73 Iowa, 336; 5 Am. St. Rep. 684; *Stylow v. Wisconsin Odd F. M. L. Ins. Co.*, 69 Wis. 224; 2 Am. St. Rep. 738, and note 740.

LIFE INSURANCE. — WHEN NOTICE TO AGENT is imputed to the company: *Fitzpatrick v. Hartford L. & A. I. Co.*, 56 Conn. 116; 7 Am. St. Rep. 288, and note 298; *McArthur v. Home Life Ass'n*, 73 Iowa, 336; 5 Am. St. Rep. 684, and note 687.

LIFE INSURANCE. — INVALIDITY OF POLICY OWING TO EXISTENCE OF DISEASE AFFECTING THE APPLICANT: Extended note to *Continental Life Ins. Co. v. Young*, 3 Am. St. Rep. 634-637. Forfeiture of policy for misrepresentations: *Id.*, note 635.

LIFE INSURANCE — ANSWER TO QUESTIONS PROPOUNDED TO APPLICANT. — Entire omission to answer a question in a written application does not avoid the policy: *Armenia Ins. Co. v. Paul*, 91 Pa. St. 520; 36 Am. Rep. 676; *Rawls v. American M. L. I. Co.*, 27 N. Y. 282; 84 Am. Dec. 280.

LIFE INSURANCE. — WORDS "GOOD HEALTH," used in a warranty in an application, mean simply that the person is well to ordinary observation and in outward appearance: *Grattan v. Metropolitan L. I. Co.*, 92 N. Y. 274; 44 Am. Rep. 372.

LIFE INSURANCE. — In case of a warranty that the answers in an application were full, correct, and true, where insured, in answer to question whether he had had any disease within ten years, and if so, what physician attended, stated that he had had typhoid fever nine years before, and gave name of attending physician, the fact that he had had other sicknesses and other physicians did not constitute breach of warranty: *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256; 25 Am. Rep. 182.

LIFE INSURANCE. — Statements, representations, and declarations of insured, as to present existing pains or maladies or diseases, are admissible and competent as to the question of the truthfulness of statements made in the application: *Swift v. Massachusetts M. L. I. Co.*, 63 N. Y. 186; 20 Am. Rep. 522; *Asbury L. I. Co. v. Warren*, 66 Me. 523; 22 Am. Rep. 590.

LIFE INSURANCE — STATEMENT OF PHYSICIAN. — Where truth of statements made by family physician of applicant for insurance are put in issue, it is competent to prove by him that he made such statements truthfully and in good faith: *Rawls v. American M. L. I. Co.*, 27 N. Y. 282; 84 Am. Dec. 280.

BIGELOW v. SHAW.

[65 MICHIGAN, 341.]

ICE BELONGS TO THE OWNER OF THE SOIL under the water on which it forms; and this rule is not confined to ponds forming or being entirely upon a person's premises, but his riparian ownership of the bed of the stream will carry with it the right to the ice forming on the surface of such stream as far as his riparian right to the soil extends.

ICE. — **MILL-OWNER HAVING THE RIGHT TO THE FLOW OF CERTAIN WATER OVER THE LANDS OF ANOTHER** has no right to the ice formed on such water, if its removal will not decrease the capacity of the mill-pond to furnish water-power to his mill, and is no injury to such water-power.

TRESPASS. Judgment for plaintiff.

M. Brown, for the appellants.

Frank Dumon, for the respondent.

MORSE, J. This action was brought in justice's court to recover damages against the defendants for entering upon a frozen mill-pond upon her lands, and cutting and removing ice during the winter of 1884-85. The defendants gave notice that the title to the land would come in question, and filed

the bond required by the statute in such case. Thereupon the justice certified the cause to the circuit court for the county of Mecosta, where a trial was had, and judgment rendered for the plaintiff for the sum of fifty dollars.

The circuit judge, Hon. C. C. Fuller, filed a written finding of the facts upon which he based his judgment.

This finding shows that the defendants, under a lease from Edward P. Shankwiler and David L. Garling, went upon that portion of a mill-pond which set back upon plaintiff's lands, and cut and carried away and disposed of for their own use two hundred cords of ice, the value of which, as it lay in the pond, was fifty dollars. The mill-pond was formed by building a dam across Ryan Creek, a small stream, not meandered, and emptying into the Muskegon River. The dam was built in 1866 by John Bigelow, the husband of the plaintiff. He then owned the northwest quarter of the northwest quarter, and the northeast quarter of the northwest quarter, and lot number 2, of section 24, and the southeast quarter of the southwest quarter of section 13, all in township 15 north, of range 10 west, in the county of Mecosta, Michigan. Ryan Creek entered these lands on section 13, and ran through both the northeast and the northwest quarters of the northwest quarter of 24. Bigelow erected this dam for the purpose of ponding the water to obtain power to run and operate a flouring-mill on section 24.

In 1873 the plaintiff joined in a mortgage with her husband, executed by him to the Albion College Endowment Fund Committee, upon the northeast quarter of the northwest quarter, and said lot 2, of section 24. This mortgage also conveyed the right of flowage to raise the water in the flume at the mill ten feet head on the said lands retained by Bigelow, and not embraced in the mortgage, situated on sections 24 and 13. This mortgage was afterwards foreclosed, and the title to the lands and the right of flowage, therein described, were acquired by said Shankwiler and Garling, under whom defendants claim the ice. Bigelow also, before the commencement of this suit, conveyed to his wife, the plaintiff, subject to the aforesaid right of flowage, a certain portion of the northwest quarter of the northwest quarter of section 24, and the same premises upon which the ice was cut by defendants. The plaintiff, therefore, at the time of the cutting of the ice, owned the land under said ice, and the defendants' lessors owned the right to flow water upon said land. The plaintiff

forbade the cutting of the ice and the entry upon the land before the alleged trespass was committed.

The cutting and gathering of the ice on said mill-pond during the winter season of each year in no manner tended to decrease the capacity of said mill-pond to furnish power to run said mill, and was no injury to the water-power. It is also found by the circuit judge that Shankwiler and Garling have always exercised great care and caution to preserve the formation of ice on the mill-pond in question, but that, previous to the execution of the lease by them to the defendants, the plaintiff, acting by and through her husband as her agent, had been accustomed to cut and gather the ice upon that portion of the mill-pond which overflowed her land, and to sell and dispose of the same for her own use and benefit.

We think the circuit judge was right in his conclusion of law that the ice belonged to the plaintiff. Shankwiler and Garling, in acquiring title under the mortgage to the Albion College Endowment Fund Committee, did not obtain any title in the land flowed, or in the water itself, but a mere right to raise the water to a certain head at the flume, and thereby overflow the land. While the proprietor of the soil thus overflowed could not draw this water off by drains or canals, so as to injure the use of the same by the mill-owners, he would have beyond question the right to use it for watering his cattle, or irrigating his lands, for domestic purposes, and for any reasonable profit or advantage which did not, in a perceptible and substantial degree, impair the operation of the flouring-mill. And the almost uniform authority is, that he may take and carry away the water when formed into ice, provided he does not thereby appreciably diminish the head of water at the dam of the mill-owner: *Cummings v. Barrett*, 10 Cush. 186; *Ham v. Salem*, 100 Mass. 350; *State v. Pottmeyer*, 33 Ind. 402; 5 Am. Rep. 224; *Edgerton v. Huff*, 26 Ind. 36; *Julien v. Woodsmall*, 82 Id. 568; *Brookville and Metamora Hydraulic Co. v. Butler*, 91 Id. 134; 46 Am. Rep. 580; *Paine v. Woods*, 108 Mass. 160; *Stevens v. Kelley*, 78 Me. 445; 57 Am. Rep. 813.

The owner of the soil under the water is ordinarily the sole and exclusive owner of the ice forming upon such water. And this is not confined to ponds forming or being entirely upon a person's premises, but his riparian ownership of the bed of the stream will carry with it the right to the ice forming upon the surface of such stream, as far as his riparian right to the soil extends: *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435;

People's Ice Co. v. The Excelsior, 44 Mich. 229; 38 Am. Rep. 246; *Washington Ice Co. v. Shortall*, 101 Ill. 46; 40 Am. Rep. 196; *Village of Brooklyn v. Smith*, 104 Ill. 429; 44 Am. Rep. 90. And in all the reported cases that I can find, except two, it is expressly held in a case like the one at bar, that the land-owner has the exclusive right to the ice, and to gather and sell it for his own benefit, provided he does not thereby impair to a perceptible and substantial extent the flow of water for mill purposes, and that the mill-owner has no right whatever to such ice. This right results from and grows out of the title to the bed of the stream, and such use of the water as results therefrom: *Stevens v. Kelley*, 78 Me. 445; 57 Am. Rep. 813; Gould on Waters, sec. 191; *Paine v. Woods*, 108 Mass. 160, 172; *Brookville and Metamora Hydraulic Co. v. Butler*, 91 Ind. 134; 46 Am. Rep. 580; *Dodge v. Berry*, 26 Hun, 246; *Marshall v. Peters*, 12 How. Pr. 218; *Washington Ice Co. v. Shortall*, 101 Ill. 46; 40 Am. Rep. 196.

In *Mill River etc. Mfg. Co. v. Smith*, 34 Conn. 462, the court held that the mill-owner had an interest in the ice, and a right to have it remain where it was, upon the ground that removing it would injure the mill-owner by lessening his supply of water; but the court did not hold that the mill-owner had any right to remove and sell the ice himself. In this case we have a positive finding of the circuit judge that the removal of this ice did not "decrease the capacity of the mill-pond to furnish power to run said mill, and was no injury to said water-power." There is one other case which holds that the ice is the property of the owner of the easement to flow: *Myer v. Whitaker*, 5 Abb. N. C. 172. It is, however, the decision of a single judge, and the reasoning is not satisfactory. It was considered and disapproved in the same state in *Dodge v. Berry*, 26 Hun, 246.

In the case of *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330, the court held, in opposition to the rule prevailing in this state, that upon navigable streams the title of the riparian owner of the soil was limited to the bank of the stream, and that, therefore, the ice forming upon such streams belonged to the general public, or the state as the representative of that public; but the court recognizes the doctrine that, upon a stream not navigable, the ice would be the property of the riparian owner of the bed of the stream.

It is contended by the counsel for the defendants that this court held in *Higgins v. Kusterer*, 41 Mich. 318, 32 Am. Rep. 160, that ice was personal property, and belonged to the pos-

essor of the water, and that in the case before us the possession of the water where this ice was cut was in Shankwiler and Garling; that they could control this overflow at will, and without such overflow no ice could be produced. In other words, they had the right to flow these premises, and form thereby a pond of water thereon, but they were not obliged to do so. They could, if they saw fit, draw off the water to the natural bed and limit of Ryan Creek as it was before said dam was built, and prevent the plaintiff from gathering ice, by removing the water upon which it must form; and, having the right to move and control the water at their pleasure, they have the exclusive possession of it to all intents and purposes, which carries the ownership of the ice, as the counsel claims, from the language of the opinion in *Higgins v. Kusterer*, *supra*.

The counsel also argues that if, for the purpose of forming ice upon the water, Shankwiler and Garling went to great care and expense to preserve the purity and enlarge the extent of its formation, and without their consent and co-operation no ice could be produced, they are certainly entitled to the ice as a matter of simple justice and equity, as well as in law.

We do not consider that the case of *Higgins v. Kusterer*, *supra*, is at all opposed to the authorities heretofore cited. It was simply decided in that case that, where the owner of the freehold upon which the ice had gathered chose to sell the ice by itself, it ought, for good reasons, some of which are stated in the opinion, to be classed as personalty instead of realty. The ownership of the ice in that case was held to be in the person possessing the water, but his possession of the water was derived solely from his ownership of the soil under the pond which contained such water. The term "possessor of the water," as used in the opinion, means the owner of the water.

In the case at bar, no one had the exclusive possession or ownership of the water, as before shown. It was in a stream in which others had rights as well as the plaintiff and the mill-owners. The use and possession of the waters of Ryan Creek by either must be subject, at all times, to the rights of other proprietors of its banks and bed, both above and below them, from its source to its end. Shankwiler and Garling had no such possession of the water as would give them any absolute ownership therein. They acquired by their title to the mill, under the mortgage foreclosure, only the right to use the water for mill purposes, and to overflow the plaintiff's land, if they

saw fit. If they did not choose to operate their mill, or could operate the same without any overflow upon plaintiff's premises, then, of course, the stream would take its natural course, and keep within its natural limit upon plaintiff's land. In that case, she could only obtain ice as it gathered over the bed of the creek, as none would form anywhere else upon her land, but she would be entitled to what ice was produced upon her premises.

If Shankwiler and Garling saw fit to use the overflow, as they did, then plaintiff would have a right to the ice upon the overflow by the same rule and principle that would give it to her in the channel of the creek. The ice forming upon the waters of the stream where it ran through the plaintiff's premises, without any overflow by the dam, would belong to her by reason of her proprietorship of the soil, although the waters of such creek could not be diverted by her to the injury of the owners of the stream below her. Upon the same principle, the ownership of the soil beneath the overflow would endow her with the exclusive property in the ice upon such overflow. The equity, if any, resulting from care on the part of Shankwiler and Garling to preserve the purity and formation of ice upon the pond, is not sufficient to change the settled rule as to its ownership.

The judgment of the court below is affirmed, with costs.

ICE — RIGHT OF OWNERSHIP IN ICE: See note to *Woodman v. Pitman*, 79 Me. 456; 1 Am. St. Rep. 352. Where owner of mill-pond executed an instrument under seal, whereby he leased, demised, and let "the sole and exclusive right to cut and carry away" from said pond "all such ice as can be cut in form and shape to be used either for private use or as merchandise," the lessor reserving to himself the right to cut all ice needed for his own use, the interest of the lessee was not a mere revocable license, and he could maintain an action against one who, without right, entered upon the pond and cut ice therefrom: *Richards v. Gauffret*, 145 Mass. 486.

CLEAVER v. TRADERS' INSURANCE COMPANY.

[65 MICHIGAN, 527.]

INSURANCE. — ORAL ASSENT BY AGENT OF AN INSURANCE COMPANY TO THE EFFECTING OF ADDITIONAL INSURANCE will not relieve the insured from the forfeiture of his policy, when it provides that such agent has no authority to waive, modify, or strike from the policy any of its printed conditions, nor in case the policy shall become void, to revive the same, and that if the assured shall procure any other or further insurance without the consent of the company written upon the policy, the policy shall become void. The assured must be presumed to have knowledge of the restrictions contained in the policy.

INSURANCE COMPANY HAS POWER TO RESTRICT THE POWERS AND DUTIES OF ITS AGENTS as it may choose; and when their authority is expressly limited and restricted by the policy which the insured receives, such restrictions and limitations must be regarded as binding upon him.

INSURANCE. — FACT THAT THE ASSURED MAY NOT HAVE READ THE PRINTED CONDITIONS OF HIS POLICY, and, in ignorance of them, relied upon the implied or assumed powers of an insurance agent, cannot help him. It is the business of the assured to know what his contract of insurance was, and there can be no difference in this respect between an insurance policy and any other contract.

WHEN INSURANCE POLICY CONTAINS LIMITATIONS UPON THE POWER OF THE AGENT, he has no legal right to contract as agent of the company with the assured so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, and the holder of the policy is estopped by its acceptance from relying upon any powers in the agent in opposition to the limitations and restrictions contained in the policy.

ASSUMPSIT on insurance policy. Judgment for plaintiff.

Norris and Uhl, for the appellant.

T. W. Atwood, for the respondent.

MORSE, J. The plaintiff brought suit to recover the amount of a policy of insurance issued by the defendant. The policy was issued on the ninth day of February, 1884, and expired February 9, 1885. The property covered by the policy was destroyed by fire, December 27, 1884. Proofs of loss were furnished, about which no question is made.

November 14, 1884, additional insurance was placed on the property covered by defendant's policy, in the sum of two thousand dollars, in the Michigan Millers' Mutual Fire Insurance Company of Lansing, Michigan. The policy in suit provides that if the insured shall procure any other or further insurance upon the property insured without the consent of the company written upon the policy, the policy shall become void. The consent of the company to the taking of the addi-

tional insurance in the Lansing company was not indorsed upon the policy.

Upon the trial in the circuit court for the county of Tuscola, the circuit judge directed a verdict for the plaintiff in the sum of \$2,797.16. This direction is assigned as error.

After the argument of counsel in the court below, it is stated in the bill of exceptions that "the counsel for defendant consented, for the purpose of raising said questions as to the validity of such clauses, that plaintiff's (Cleaver's) testimony be regarded as correct."

The clauses referred to were the one already noticed, as to the taking of additional insurance, and the following: "It is further understood, and made part of this contract, that the agent of this company has no authority to waive, modify, or strike from the policy any of its printed conditions; . . . nor in case this policy shall become void by reason of the violation of any of the conditions thereof, has the agent power to revive the same. . . . And it is hereby mutually understood and agreed by and between this company and the assured that this policy is made and accepted upon and with reference to the foregoing terms and conditions, all of which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for in writing."

The plaintiff claims that because of the action of defendant's agent, Mr. Quinn, with reference to his procuring the additional insurance, the defendant is estopped from setting up the defense of additional insurance in this case.

The substance of the plaintiff's testimony in regard to Quinn's action in the premises is this: When an application was sent by the Lansing company to him to be filled out, he took it to Quinn, and told him that he was calculating to take out two thousand dollars insurance in that company, and asked him if it would be all right with Quinn's company, and Quinn said it would, the property being amply worth the amount of both insurances; and thereupon Quinn helped him fill out the application, and Cleaver sent it on to Lansing. Quinn also looked at his books, and said the insurance was not yet out in his company, and asked Cleaver if he calculated to drop it; and Cleaver answered "No," and told him that he would make arrangements to have another policy issued when that expired. Quinn also asked him why, if he

was going to take more insurance, he did not take it in the defendant company, and Cleaver replied that he could get it for a less per cent in the Lansing company. After plaintiff received his policy in the Lansing company, he informed Quinn that he had procured the same. Quinn replied, "All right," and passed on, without any further conversation.

Cleaver also states that he obtained the additional insurance, relying upon the statement of Quinn that it would make no difference with his insurance in the defendant company. It also appeared that Quinn was an attorney at law, and before this had done some legal business for Cleaver. Plaintiff, however, denies that, in this instance, he went to Quinn, as a lawyer, to get advice and assistance in filling out the application. He testifies he called upon him to talk with him about the getting of additional insurance, and because he did not wish to put such additional insurance upon the property unless it would be satisfactory to the defendant company.

The counsel for defendant contend that this case is not governed by *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143, because of the clause in the policy providing that the agent of the company "has no authority to waive, modify, or strike from the policy any of its printed conditions." It is insisted that if the conduct of Quinn is held to operate as a waiver, a new contract is constructed for the parties by judicial creation, in direct antagonism to the express agreement of the insured and insurer in the policy of insurance upon which plaintiff is seeking to recover.

In *Westchester Fire Ins. Co. v. Earle*, *supra*, it is stated, in the opinion of Mr. Justice Campbell, at page 153, that "the powers of Atwater [the agent], in the present case, do not appear to be restricted in any way"; and in none of the other cases decided in this court, and relied upon by plaintiff's counsel, can I find any mention of any clause in the policies prohibiting the agent from waiving this condition as to additional insurance: See *Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich. 51; *Kitchen v. Hartford Fire Ins. Co.*, 57 Id. 135; 58 Am. Rep. 344; *Carpenter v. Continental Ins. Co.*, 61 Mich. 635.

It has been held by this court (*New York Cent. Ins. Co. v. Watson*, 23 Mich. 486) that additional insurance, obtained without the written consent stipulated in the policy, rendered such policy absolutely void upon the procuring of such additional insurance; and that the first policy could not be revived by anything short of a new contract, or such conduct as, by

misleading the insured to his prejudice, would operate as an estoppel.

It is claimed here that the action of the agent was the action of the company, and that such action created an estoppel. But it is not shown that the agent had any authority to indorse upon the policy the written consent to additional insurance, or to waive in any way the provisions of the policy. On the contrary, the policy delivered to the insured expressly states that such agent "has no authority to waive, modify, or strike from the policy any of its printed conditions; . . . nor in case this policy shall become void by reason of the violation of any of the conditions thereof, has the agent power to revive the same."

And it also appears by the testimony of the agent, Mr. Quinn, who was sworn as a witness on behalf of plaintiff, that he had no authority to consent to additional insurance, but, when application was made for such consent, it was his duty to notify the company, which he did not do in this case.

It is not shown that the company had any notice of the action of the agent in filling out the application for additional insurance, or his remark to Cleaver that such insurance would be all right, and make no difference with the insurance in defendant company. Nor is it claimed that the defendant received any premium for insurance after the obtaining by plaintiff of the additional insurance, or did any act recognizing the existence or validity of the contract, either before or after the fire. The case is not, therefore, ruled by *Carpenter v. Continental Ins. Co.*, 61 Mich. 635, and cases there cited.

It cannot be said, as in the case of *Kitchen v. Hartford Fire Ins. Co.*, 57 Mich. 135, 58 Am. Rep. 344, that the insured relied upon the statements of the agent as authorizing him to procure the additional insurance. In that case, Kitchen had a right to rely upon the representations of the agent, as there was "no evidence that any restriction upon his authority as agent was brought to the knowledge of plaintiff, or others dealing with him." But in the case at bar, the plaintiff must be presumed to have had knowledge of the restrictions placed upon the agent by the terms of the policy he received, and the want of authority expressly appearing in its conditions was sufficient notice to him that he could not bind the company by a parol acquiescence in the taking of additional insurance.

If the agent, under the circumstances of this case, by filling out the application for the Lansing insurance, and saying it was all right, can estop the defendant company from raising and enforcing this defense, then the clauses prohibiting the agent from waiving the conditions of the policy, or from reviving it after it has become null and void, are rendered entirely useless and nugatory.

It cannot be successfully maintained but that the company has the right and the power to restrict as it may choose the powers and duties of its agents; and when the authority is expressly limited and restricted by the policy which the insured receives, there can be no good reason, either in law or equity, why such limitations and restrictions shall not be considered as known to the insured, and binding upon him.

This is not a case where the insured had a right to rely upon the action of the agent, or to presume that his action was known to the company, and ratified by them, as in *Security Ins. Co. v. Fay*, 22 Mich. 467; 7 Am. Rep. 670. The policy received by Cleaver distinctly pointed out the way to procure additional insurance without voiding the first insurance, and expressly prohibited the agent from waiving, altering, or modifying the process of obtaining further insurance.

The fact that the plaintiff may not have read the printed conditions of his policy, and relied, in ignorance of them, upon the implied or assumed powers of the agent, cannot help him. It was his business to know what his contract of insurance was, and there can be no difference in this respect between an insurance policy and any other contract. In the absence of any fraud in the making of the same, and none is claimed in this case, the insured must be held to a knowledge of the conditions of his policy, as he would be in the case of any other contract or agreement. When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy: *Merserau v. Phoenix Mut. Life Ins. Co.*, 66 N. Y. 274; *Catoir v. American Life Ins. & Trust Co.*, 33 N. J. L. 487.

The circuit judge, as the case stood in the court below, should have directed a verdict in favor of the defendant.

The judgment of the lower court is therefore reversed, and a new trial granted, with costs of this court to defendant.

INSURANCE. — BROKER WITH AUTHORITY SIMPLY TO RECEIVE AND FORWARD APPLICATIONS, deliver policies, and collect premiums, has no apparent power to bind the company by altering policy: *Duluth National Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76; 4 Am. St. Rep. 744, and note 751.

INSURANCE — STIPULATIONS IN CONTRACT OF. — AN AGENT of a mutual insurance company filling up an application is an agent of the company, notwithstanding a stipulation to the contrary in the policy: *Kausal v. Minnesota etc. Ass'n*, 31 Minn. 17; 47 Am. Rep. 776.

INSURANCE. — WHERE AGENT OF COMPANY FILLED APPLICATION, and to question of encumbrances, applicant said he could put down what he pleased, and agent said he would put down "no encumbrances," to which applicant made no reply, the statement being untrue, avoided the policy: *Blooming G. M. F. Ins. Co. v. McAnerney*, 102 Pa. St. 335; 48 Am. Rep. 209. But otherwise where applicant makes correct answers to questions, and agent inserts falsely: *Insurance v. Williams*, 39 Ohio St. 584; 48 Am. Rep. 474; *Planters' Ins. Co. v. Sorrels*, 1 Baxt. 352; 25 Am. Rep. 780; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; 30 Am. Rep. 521.

INSURANCE. — POLICY IS AVOIDED BY OBTAINING A SUBSEQUENT AMOUNT OF INSURANCE with the mere oral consent of president of insurance company, where such is contrary to the by-laws: *Hale v. Mechanics' M. F. Ins. Co.*, 6 Gray, 169; 66 Am. Dec. 410.

INSURANCE. — AGENT CANNOT, WITHOUT AUTHORITY, WAIVE ANY STIPULATION in a written insurance policy, especially by acts or words of his own, when it is expressly stated in policy that a breach of such stipulation shall render policy void: *Robinson v. Fire Ass'n etc.*, 63 Mich. 90.

UTTER v. TRAVELERS' INSURANCE COMPANY.

[65 MICHIGAN, 545.]

ACCIDENT INSURANCE — DEATH, WHEN NOT THE RESULT OF DESIGN. — ACCIDENT insurance policy contained a condition exonerating the insurer from liability, if the death of the assured was the result of design on the part of the assured or any other person. The assured was shot by an officer; but there was some evidence tending to show that the officer did not know it was the assured at whom he shot, and that he did not intend to kill the assured. *Held*, that if this evidence were true, it could not be said as a matter of law that the assured lost his life from the design of another.

DEATH DOES NOT RESULT FROM THE UNLAWFUL ACT OF THE ASSURED, if he was a deserter and was killed by an officer, who was instructed to arrest him as such deserter, if he was not doing any unlawful act at the time he was killed.

ACCIDENT INSURANCE — VOID CONDITION. — CLAUSE IN A POLICY OF INSURANCE REQUIRING DIRECT OR POSITIVE PROOF that the death of the

assured was caused by external violence and accidental means, and was not the result of design, either on the part of the assured or any other person, cannot be allowed to prevail as a rule of evidence on the trial of an action against the insurer. Courts will not permit the course of justice upon a trial before them to be stipulated or contracted in such manner as to defeat the ends to be subserved by such trial.

IT STIPULATION OR EXCEPTION IN A POLICY OF INSURANCE IS CAPABLE OF TWO MEANINGS, that must be adopted which is most favorable to the assured.

ASSUMPSIT on insurance policy. Trial judge directed a verdict for the defendant.

Hanchett and Stark, for the appellant.

Wisner and Draper, for the respondent.

MORSE, J. The defendant, on the seventeenth day of September, 1880, in consideration of a premium then paid by him, issued and delivered to William Samuel Utter an accidental insurance policy for the benefit of the plaintiff, who was his mother. This policy insured said Utter against death occurring through violent, external, and accidental means, for one year, in the sum of one thousand dollars.

When this insurance was effected, the said Utter was under age, and had before that time enlisted as a musician in the regular army. March 28, 1880, he deserted the service while stationed at Fort Verde, Arizona, and went to Los Angeles, California. He was at the latter place when insured and at the time of his death, which occurred within the life of the policy, February 12, 1881.

After complying with the requisites of the policy as to proofs of death, and after refusal of payment thereon, the plaintiff brought suit for the recovery of the sum named therein in the circuit court for the county of Saginaw.

The defendant pleaded the general issue, and gave notice under the same that it was provided in the policy as follows:—

“And no claim shall be made under the policy when the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, or while the insured was or in consequence of his having been under the influence of intoxicating drinks, or while engaged in or in consequence of any unlawful act.”

“And said defendant will show and prove, upon the trial of said cause, that William Utter, the insured named in said policy, was a soldier in the army of the United States, and

while so engaged, on or about the twenty-eighth day of March, 1880, deserted and fled from his post and command; and while being a deserter, and endeavoring to avoid capture as a deserter, and being returned to the army authorities, and while seeking to escape arrest as a deserter, was shot and killed.

"And said defendant will also show that, at the time said William Utter received the injury which resulted in his death, he was intoxicated; and also that such injury was received in consequence of his having been under the influence of intoxicating drinks.

"And defendant will also show that the death of said William Utter happened in consequence of his voluntary exposure to unnecessary danger, and in consequence of his unlawful act, in that, being a soldier in the army of the United States, he became and was a deserter therefrom on or about the twenty-eighth day of March, 1880, thereby subjecting himself to pursuit and attempted capture, and the danger and peril attending the same, and thereby being engaged in an unlawful act; and while being such deserter, and while attempting to escape capture, and thus exposing himself to unnecessary danger and peril, and while thus engaged in an unlawful act, the said William Utter was shot and killed by an officer who was endeavoring to arrest him as a deserter, and from whom said Utter was seeking to escape.

"The defendant will also show that the said William Utter was killed while engaged in an unlawful act, and also in consequence of an unlawful act, within the meaning of said policy, in that he did commit an assault upon one J. A. Berry, by pointing directly at him—said Berry—a pistol in a threatening manner, and so as to induce, in the mind of said Berry, the belief that he intended to fire, and that he, said Berry, was in danger, and thereupon, in consequence of said act of Utter, said Berry shot and killed him."

The policy also contained the following clause, which becomes material in the discussion of the case as it stands in this court: "And this insurance shall not be held to extend to disappearances, nor to any case of death or personal injury, unless the claimant under this policy shall establish, by direct and positive proof, that the said death or personal injury was caused by external violence and accidental means, and was not the result of design, either on the part of the insured, or of any other person."

Upon the trial, at the close of the testimony, the circuit judge directed a verdict for the defendant. The jury rendered such verdict, and judgment passed thereon for the defendant.

Utter was killed in a house of ill-fame in Los Angeles, by a pistol-shot fired by one Berry, a deputy sheriff of Los Angeles County. It seems that the captain of the company to which Utter belonged learned of his whereabouts, and telegraphed to the sheriff a description of Utter, stating that he was a deserter. This telegram was shown to Berry, and he was instructed by the under-sheriff to arrest Utter. Berry, without any warrant, process, or other authority, went to this house where Utter was, and shot and instantly killed him. The facts as to the killing are conflicting, as stated by the different witnesses.

George Branagan, who testifies on the behalf of the plaintiff, says that Utter, John H. Sheehan, and himself were in the house together, sitting in a room used as a kitchen, talking together. Utter said a policeman was after him. After they had sat there some five or ten minutes, some one came to the front door and rapped very loud. The door was locked. There was a door of the kitchen opening out on an alley-way that ran into the street. Some one came and rapped at that door, and then stopped. The noise stopped a little while. "Perhaps a minute afterwards Utter got up and opened the door. A shot was fired, and he fell. Then one Berry came into the room through the door, with his pistol in his hand, pointed the pistol at Sheehan, and told him to throw up his hands, saying to him, 'I believe you are Billy Utter.' Sheehan replied, 'No; you've killed your man.'"

The door through which Utter was shot opened on the inside of the room, and turned on its hinges to the right, so that it was impossible almost for one at the same time to use any weapon. "The shot was fired as soon as the door was opened wide enough to allow Utter to poke his head around, and look out."

Branagan did not hear anything spoken, either by Berry or Utter at the time. Had anything been said, thinks he would have heard it. Utter was shot in the head. He was not under the influence of intoxicating liquors, and Branagan did not see any revolver in his hand when he was shot.

Berry testified, on the part of the defendant, that he was deputy sheriff of Los Angeles County; that on February 12,

1881, he received instructions from the under-sheriff to arrest William Utter. He had no warrant or other writ, and no complaint had been lodged against Utter. Had no authority except the under-sheriff's instructions, and a telegram he had seen, the substance of which was to arrest Utter, he thinks, for being a deserter. "That, on receipt of telegram, he asked Jeff. Thompson to go with him. They found Utter in a house of ill-fame on Los Angeles Street, in Los Angeles, California. Witness looked through the blind into the room, and saw Utter and another man in the room. He then sent Bottelle, a man who was with witness, to arm himself. While he was gone, a woman came out of the house, and ordered witness off. He refused to go, but followed her into the house. When he got to the room where he had seen Utter, there was no one in it. Heard a noise in an adjoining room, and tried to enter that room, but the door was locked. He then heard a noise as of a door opening on the outside, and passed out, and was approaching an outside door, when the door opened, and Utter appeared. Witness told him, in substance,—he cannot remember the exact language,—to throw up his hands; that he (witness) was an officer, and arrested him. The moment that he presented his pistol and spoke to him, Utter stepped back a step, and raised his pistol, pointing it at witness. Witness fired, and Utter fell. The moment the door opened, witness commanded him to throw up his hands, and there was no other conversation. Utter did not speak. Don't know whether his revolver was cocked or not; but considered his action threatening and dangerous. It was between eight and nine o'clock in the evening. Branagan and another party were in the house with Utter. I knew Utter by sight. I recognized him when I saw him. I spoke as soon as the door opened, disclosing him."

Three other witnesses, who did not see the shooting, testified that they each came there shortly after, and saw a pistol lying on the floor beside the body of Utter.

The plaintiff also introduced evidence tending to show that Utter was partially deaf, so that his hearing was materially affected; that neither his father nor mother consented to his enlistment, and that the father, at the time of the killing, was engaged in measures to obtain his release from the service.

Upon this testimony, which is here substantially given, the court below based its opinion that "the injury was a pistol-shot wound, and the firing of the pistol was not accidental,"

but designed by the firing party, and that the policy was not "intended to insure against murder or willful killing of any kind, but intended to insure against ordinary accidental means alone,—what we properly know as accidents." It is true, as the court below said, that there is no dispute with regard to the fact that the officer intended to shoot, and intended to inflict bodily injury upon some person. The officer deposes that he knew it was Utter when he fired, but the evidence of Branagan tends very strongly to show that he did not know it was Utter he had shot, and, after he came into the room, thought Sheehan was Utter, until informed by Sheehan that he "had killed his man."

It is claimed by the counsel for the plaintiff that the "design" mentioned in the policy must be considered as a design to kill Utter, and that there was evidence in the case sufficient to go to the jury, tending to show that the act that caused the death of Utter was not done with the design of killing him. In other words, if Berry went to the house where Utter was, not with the intention of killing him, but for the purpose of arresting him, and when the door was opened, by reason of Utter's drawing a pistol, or any other cause, he fired, not knowing it was Utter, although the death of Utter was caused thereby, and Berry meant to kill whoever it was, it cannot be held that the death of Utter was caused by design; that, when the design was to kill, it must also be a design to kill Utter, then formed in the mind, and intentionally carried out by the act.

If a person should draw a pistol in a crowded street, and deliberately fire the same, with the intent of killing some one, or with a reckless disregard of human life, and a person was killed or wounded, would such killing or wounding be an accident, in the meaning of this policy, or would it be by the design referred to therein? There would undoubtedly be a design to kill or wound some one, but no design to kill or wound the particular person injured. Suppose that, for the purposes of plunder, persons arrange to throw a passenger train off a railroad track, knowing that such act is liable to kill or injure some one, but having no malice against any individual thereon, or any design to kill any particular person, and the train is derailed, and the insured killed, can it be said that his death was not accidental, under this policy, but by the design of some person?

The argument may be carried further. Suppose one fires

a pistol in the air. He fires by design, but does not intend to kill any one. The shot strikes the insured, and kills him. The act which causes the death — the shooting of the pistol — is designed, and therefore not accidental, but the killing is certainly accidental, and not designed. If the pistol is fired at one man, and hits another, is it any less accidental, as far as the person hit is concerned, or the mind of the person who does the shooting? And, if the shot is fired at the insured in the belief that he is another man, is not the character of the act the same? If one designedly roll a stone down a mountain-side with no intent to injure any one, and in its course it crush a man, it is an accident. If it were purposely rolled down to crush one man, and it is deflected from the course intended, and kills another, is it not equally an accident? The design or purpose was not to kill the one injured, because it was intended to kill another, and not him. The criminal intent of the one putting the stone in motion may render him guilty and responsible for the actual result, though not intended; yet the death of the person thus killed must be considered, as far as he is concerned, an accident, as his death was not intended by any one.

It seems to me that the design intended by the terms of this policy must be the design that intended the actual result accomplished, and not the design of the act itself, which act resulted in the killing of one contrary to the design of the act. If, when Berry fired this shot, he did not know the man he fired at was Utter, and did not intend to kill Utter, it cannot be said that Utter lost his life by the design of Berry.

Nor can it be held, as a matter of law, that Utter was engaged in an unlawful act, within the meaning of this policy. If he had been shot in the act of deserting, this claim might be made with some reason and propriety, but such was not the case here. Neither was he shot because he was a deserter, nor because he was in a house of ill-fame. He was shot, if Berry is to be believed, because he did not throw up his hands when commanded to, and was in the act of drawing a pistol. He was killed, if Branagan is to be believed, without provocation, and in a wanton and murderous manner, as soon as his head appeared in the door. Whether he was doing anything unlawful at the time of the shooting, was also a question for the jury, to be determined by them under all the circumstances of the case.

“f, on being refused admittance after rapping on the door,

the officer had fired through the door, and killed Utter, it could not be claimed that Utter was killed by design, or because he was engaged in any unlawful act; nor if Berry fired at the first head he saw poked out of the door, not knowing or caring who it was, can it be held that the death was by design against Utter, or in consequence of any unlawful act on his part?

The clause in the policy requiring direct and positive proof that the death was caused by external violence and accidental means, and was not the result of design, either on the part of the insured or of any other person, cannot be allowed to govern the courts in cases of this kind. The intent of Berry is locked within his own breast, and can only be determined by his own evidence, or the inferences to be drawn from his acts, which latter would be in the nature of circumstantial proof. If Berry himself had been killed, it would have been impossible, by "direct and positive proof," to show what his real design was, and it would also be manifestly against the policy of the law, and diametrically opposed to justice, to allow his own testimony of his motives, however unsatisfactory it might be, to be controlling, when all the facts of his actions and language at the time contradicted his positive assertions of his intent upon the trial. If this clause can be allowed to stand, any person accidentally killed when no one is by is debarred from the benefit of his insurance. Circumstances may plainly and almost certainly indicate that he was killed by accident, and yet no positive and direct proof can be furnished. If an accident happen upon a railroad by the fault of one of its employees, who is killed by the accident, his design in causing such accident cannot be shown by direct and positive proof, and the beneficiaries of an insured person killed by such accident cannot recover. The design of the person responsible for the killing can in no case be directly and positively proven except by his own evidence or admissions.

Courts will not permit the course of justice, upon trials before them, to be stipulated or contracted in such manner as to defeat the ends to be subserved by such trials. The parties to the contract cannot agree to oust the courts of jurisdiction over such contract. The operation of this clause, requiring direct and positive proof, in many cases would, in effect, preclude the court from jurisdiction, and bar a recovery. If they can make this agreement, they can also stipulate that the evidence must come from certain persons, or make any agree-

ment they see fit, controlling and directing the course of proceeding upon the trial. They may contract in relation to a condition precedent before bringing suit, or in relation to anything going to the remedy, but not to the right of recovery itself: Wood on Insurance, 2d ed., sec. 456, p. 1011. Circumstantial evidence is regarded by the law as competent to prove any given fact; and sometimes it is as cogent and irresistible as direct and positive testimony.

The case should have been submitted to the jury. The "design" mentioned in the policy must be considered a design on the part of Berry to kill Utter; and if, at the time he fired the pistol-shot, he did not intend to kill Utter, or did not know that the man he was shooting was Utter, there is nothing in the present record to prevent a recovery by the plaintiff.

When a stipulation or exception to a policy of insurance emanating from the insurers is capable of two meanings, the one is to be adopted which is the most favorable to the insured: May on Insurance, secs. 174, 175; Wood on Insurance, 2d ed., secs. 60, 62; *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473.

There was evidence in the case having a tendency to show that Berry did not intend to kill Utter, and did not know that the person he had killed was Utter until after the shooting.

The judgment, therefore, in my opinion, should be reversed, and a new trial granted, with costs of this court to plaintiff.

WHETHER PARTIES MAY, BY THEIR STIPULATIONS INSERTED IN A CONTRACT, MAKE A RULE OF EVIDENCE BY WHICH THE COURTS MUST BE BOUND IN LITIGATION SUBSEQUENTLY ARISING UNDER SUCH CONTRACT. — The precise question here involved does not appear to have been hitherto adjudicated by the courts of last resort, nor is it easy to find decisions upon the subject which are strictly analogous. It was, however, held by the supreme court of the United States, in a more recent case than the principal one, and which was also a suit upon what is commonly called an accident policy of insurance, that a condition in the policy requiring direct and positive proof to be made of death having been caused by external, violent, and accidental means, did not deprive the plaintiff, when making such proof, of the benefit of rules of law established for the guidance of courts and juries in the investigation and determination of facts: *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661. The jury were at liberty to draw such inferences in respect to the cause of death as, under the settled rules of evidence, the facts and circumstances justified: *Id.*

The doctrine of the principal case, that parties cannot, by any agreements entered into by them, control the course of justice, or effectually oust the courts of the jurisdiction which has been conferred upon them, is well sustained by authority: *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417; 96 Am. Dec. 472. Thus, although arbitration is regarded both by the courts of England and of this country as a legitimate means of settling disputes, yet an agree-

ment to submit to arbitration will not be held valid, either in law or equity, when its effect is to oust the court of jurisdiction: *Pearl v. Harris*, 121 Mass. 390; *Vass v. Wales*, 129 Id. 38; *Sutro Tunnel Co. v. Segregated Co.*, 19 Nev. 121; *Com. Un. Assu. Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562, and note 566; *Allegre v. Maryland Ins. Co.*, 6 Har. & J. 408; 14 Am. Dec. 289, and note 296, 297; *Hill v. Moore*, 40 Me. 515; *Campbell v. Insurance Co.*, 1 McAr. 246. And where a policy of insurance provides that the whole matter in controversy between the parties, including the right to recover at all, shall be submitted to arbitration, the condition is void, since its effect is to oust the courts of their legitimate jurisdiction, which the parties cannot do: *Gray v. Wilson*, 4 Watts, 39; *Rowe v. Wilson*, 97 Mass. 163; *Insurance Co. v. Morse*, 20 Wall. 445; *Roper v. Lendon*, 1 El. & E. 825; *German-American Ins. Co. v. Etherton*, Sup. Ct. Neb. 1889. On the other hand, parties may lawfully agree to impose a condition precedent, with respect to the mode of settling the amount of damage, or the time for payment, or any matters of that kind which do not go to the root of the action: *Scott v. Avery*, 5 H. L. Cas. 811; *Livingston v. Ralli*, 5 El. & B. 132; *Trott v. City Insurance Co.*, 1 Cliff. 439; *Wolff v. Liverpool etc. Ins. Co.*, 50 N. J. L. 453. This distinction is recognized by the court in the principal case, and by the authorities generally: See *Cobb v. New England etc. Ins. Co.*, 6 Gray, 192; *Hill v. Moore*, 40 Me. 515; *Com. Un. Assu. Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562, and note 566-571; *Hostetter v. Pittsburgh*, 107 Pa. St. 419; *Old Saucelito etc. Dock Co. v. Commercial Un. Assu. Co.*, 66 Cal. 253; *Davenport v. Long Island Ins. Co.*, 10 Daly, 535; *Herrick v. Belknap*, 27 Vt. 673; *President etc. Delaware and Hudson Canal Co. v. Pennsylvania Canal Co.*, 50 N. Y. 250, 266; *Perkins v. United States Electric Light Co.*, 21 Blatchf. 308. The distinction in brief is, that conditions precedent annexed to the contract, such as bringing the action within a certain time, practicing no fraud, making seasonable and true representations of loss, and the like, are to be regarded as modifications of the contract, and not of the remedy, and are such as the parties may lawfully agree to impose; but the rule is otherwise as regards stipulations concerning the remedy, which does not depend upon contract, but is created and regulated by law: *Nute v. Hamilton Mut. Ins. Co.*, 9 Gray, 174, 180. It was accordingly held in this case that a stipulation in a policy of insurance providing that no suit shall be brought thereon, unless in the county where the insurance company is established, is not binding on the insured; and so in *Hall v. People's etc. Ins. Co.*, 6 Gray, 185. The same is true of a stipulation in a policy of insurance, whereby the insured waives the right to bring suit upon the policy except in the courts of the state incorporating the company: *Richard v. Manhattan Life Ins. Co.*, 31 Mo. 518. So of a stipulation whereby the insured waives the right to have the cause removed to the federal court: *Insurance Co. v. Morse*, 20 Wall. 445; reversing 30 Wis. 496; *Hobbs v. Manhattan Ins. Co.*, 56 Me. 419.

These decisions are based upon the principle that every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him; and he cannot bind himself in advance by an agreement to forfeit his rights at all times and on all occasions whenever the case may be presented: *Insurance Co. v. Morse*, 20 Wall. 445. The law, and not the contract, prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case than they have to provide a remedy prohibited by law. Such stipulations assume to divest the courts of their established jurisdictions, and as conditions precedent to an appeal to the courts, they

are void: *Stephenson v. Insurance Co.*, 54 Me. 70; not, however, upon considerations of public policy alone, but "the greatest inconvenience would result in requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating mainly to the remedy, according to the stipulations of parties in forming and diversifying their contracts in regard to remedies": Shaw, C. J., in *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174, 184. And that able jurist enumerates certain stipulations which, if inserted by the parties in an ordinary contract, cannot be relied upon by way of defense to a suit brought on the breach of such contract. Among such stipulations are the following: "That in case of breach no action shall be brought; or that the party in default shall be liable in equity only, and not at law, or the reverse; that in any suit to be commenced no property shall be attached on mesne process, or seized on execution for the satisfaction of a judgment; or that the party shall never be liable to arrest; that, in any suit to be brought on such contract, the party sued will confess judgment, or will waive a trial by jury, or consent that the report of an auditor appointed under the statute shall be final, and judgment be rendered upon it, or that the parties may be witnesses, or, as the law now stands, that the plaintiff will not offer himself as a witness; that, when sued on the contract, the defendant will not plead the statute of limitations, or a discharge in insolvency"; and the like: *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174, 181. And it may be added that, in the light of existing authority, a stipulation by parties, inserted in a contract, that certain evidence only shall be admissible in case of litigation subsequently arising under such contract, cannot be allowed to control the action of the court in the admission of or in the effect to be given to evidence: See *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661. It is, however, observed, in reference to agreement to arbitrate, that the tendency of the later decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences without a resort to courts of law; and that the better way is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties, any departure from this principle being an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made: Allen, J., in *President etc. Canal Co. v. Penn. Coal Co.*, 50 N. Y. 250, 259.

The case of *Carey v. Brown*, 62 Cal. 373, was an action of ejectment in which the plaintiff claimed to have acquired title to the property in controversy under and pursuant to a sale made by the trustees of the defendant. The deed of trust, which was one executed for the purpose of securing a loan of moneys, after providing for a sale in certain contingencies, and the execution of a deed upon such sale, and the recitals to be inserted therein, declared that "any such deed or deeds, with such recitals therein, shall be effectual and conclusive against said party of the first part, his heirs, assigns, and all other persons; and the receipt for the purchase-money contained in any deed shall be a sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase-money according to the trusts aforesaid." A sale had been made, and a deed executed by the trustees containing the recitals authorized by the trust deed. The supreme court of the state declared that the defendant, under the circumstances developed on the trial, which excluded all possibility of actual fraud in which the purchaser was implicated, was bound by the deed made by the

trustees, and that the same was, as provided by the stipulation, conclusive evidence of the truth of the facts recited.

The stipulation, in the principal case, attempting to confine the evidence receivable to direct or positive evidence, that the death for which a recovery was sought was not the result of design, was objectionable on the ground that it was in conflict with the general nature and purpose of the contract, — was, in effect, repugnant to the contract, or at least likely to become so, in very many of the contingencies in which it might be sought to be enforced. Very naturally, the assured expected to have his family or personal representatives indemnified, in the event of his death by an accidental cause. But, from the happening of that against which he was insured, to wit, his death, his evidence was no longer obtainable; and with him, the only direct evidence, both of the means by which his death was produced and the design of the producer, also perished.

But, upon principle, we see no objection, in ordinary cases, to the parties to a contract stipulating that a certain class of evidence may be received or excluded, as the case may be. Thus, to avoid the peril and uncertainty of parol evidence, a principal may stipulate that he will not be bound by a contract made by his agent, unless reduced to writing and signed; or, in other words, that none but written evidence of the contract shall be received. He may so conduct himself as to waive this stipulation in a particular case; but, in the absence of any waiver or fraud on his part, he is entitled to its benefit as a rule of evidence.

So, we think, the maker of a trust deed or mortgage, in conferring a power of sale on his mortgagee or trustee, may declare that a deed made in apparent execution of the power may be conclusive evidence of the performance of such acts as were necessary to the due execution of the power; and that, in the absence of fraud of which the purchaser has notice, this declaration must be accepted as a rule of evidence, operative against him who made it and his successors in interest. He receives a benefit from it in the fact that the increased certainty it gives to any sale effected under it must necessarily contribute to the realization of a fair price for the property sold.

ACCIDENT INSURANCE. — WHERE TRAVELER BY RAILWAY, WHILE ASLEEP AND UNCONSCIOUS, involuntarily arose and walked to the car platform, and fell therefrom and was injured, it was not a case of "voluntary exposure, design, or self-inflicted injuries": *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13; 46 Am. Rep. 618.

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2. **REVIVAL OF ACTION.** — If PARTY TO ACTION DIES, AND CAUSE OF ACTION SURVIVES, ADVERSE PARTY may at any time within one year thereafter cause the action to be continued by or against the personal representative of such deceased party. *Mitchell v. Schoonover*, 282.

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ADVERSE POSSESSION.

1. **CONFLICTING DEEDS—INTERLOCK.** — Where conflicting grants or deeds cause an interlock, and the elder grantee or owner is in actual possession of his land outside the interlock, and the junior grantee or adverse claimant is in actual possession of a part of the interlock, claiming the whole to the extent of his boundary, such possession of the former outside the interlock will not limit the possession of the latter to his inclosure, but he will be held to be in adverse possession of all the land in the interlock. *Heavner v. Morgan*, 55.
2. **ADVERSE POSSESSION**, so as to set the statute of limitations in operation, must be actual, open, and continuous, accompanied by an intention, under claim of title, on the part of the occupant to hold the land as owner. Though exclusive and hostile to the real owner in appearance, it cannot be effectually adverse, unless accompanied by the intent on the part of the occupant to make it so. Naked possession, unaccompanied with any claim of right, does not constitute a bar, but inures to the benefit of the real owner. *Colvin v. Republican B. L. Ass'n*, 114.
3. **ADVERSE POSSESSION IS ESTABLISHED OVER LAND OF ANOTHER, WHERE THE SAME IS INCLOSED BY MISTAKE**, together with defendant's own land, to a surveyed line, and is occupied by him as owner for a longer period

than the statutory limit, by actual and uninterrupted possession. *Tes v. Pfug*, 231.

4. CONTINUOUS ADVERSE POSSESSION FOR MANY YEARS IS TO BE PRESUMED as a fact known to the real owner of the land, which should put him upon inquiry, disclosing the source of the adverse claim, which he will also be presumed to have known. And if, under such circumstances, he remains inactive for many years, to the prejudice of innocent purchasers, he will not be entitled to relief in a court of equity. If in fact there was ignorance of the adverse possession, not only should that be made to appear, but it must be excused before the plaintiff would be entitled to relief. *Bausman v. Kelley*, 661.
5. CO-TENANCY. — Where occupant of land under tax titles becomes entitled to a part of the land by a conveyance of the original title to such part by an heir, a presumption arises that he is a tenant in common with the other owners of the original title, and that he ceases to be an adverse holder thereafter; but such presumption may be overcome by evidence that the original possession was continual with the intention to exclude the other owners from any right or interest in the land, and the question may be properly submitted to the jury. *Cook v. Clinton*, 816.
6. MUST BE OPEN. — All adverse possession must be open, notorious, continuous, exclusive, visible, and distinct, as well as adverse. There must be an actual occupancy, as distinguished from a constructive possession, of a part or the whole of the property claimed. *Id.*

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ANIMALS.

1. ANIMAL ESCAPING FROM ITS OWNER AND WANDERING ABOUT is an estray, within the meaning of the Oregon statute upon that subject. But an animal turned upon a range by its owner, and permitted to run at large, is not an estray, although its owner is ignorant of its immediate whereabouts, so long as it does not wander from the range and become lost. *Stewart v. Hunter*, 267.
2. TAKING UP ESTRAY PROPER, PURSUANT TO LAW, AND CAUSING IT TO BE SOLD in order to reimburse the party for the reasonable expenses incurred, is not depriving the owner of his property "without due process of law," but is a preservation of it for his benefit. *Id.*
3. ESTRAYS. — FACT THAT ANIMAL IS BRANDED FURNISHES EVIDENCE of its ownership, but is not constructive notice that it belongs to the party branding it, although the brand is recorded. *Id.*

APPEAL AND ERROR.

1. ERROR WITHOUT PREJUDICE will not work a reversal of the judgment. *Moran v. Clark*, 66; *Village of Ponca v. Crawford*, 144.
2. WHERE IT IS CLEAR THAT THE JUDGMENT upon the conceded facts is the only one that could properly be rendered, and that another trial

would therefore necessarily result in the same way, an error cannot be said to have prejudiced a party. *Heckle v. Grewe*, 332.

3. **ERROR CANNOT BE ASSIGNED BY PLAINTIFF** on account of withdrawal by the defendant of special questions submitted to the jury, where such withdrawal could work no prejudice to the plaintiff. *Cook v. Clinton*, 816.
4. **THE ORDER ADMITTING EVIDENCE IS DISCRETIONARY** with the court. *Village of Ponca v. Crawford*, 144.
5. **REVIEW OF QUESTIONS OF FACT.** — WHERE THE ISSUE WHETHER PARTY WAS SUED BY WRONG NAME IS MADE ONE OF FACT by the pleadings, and as such is submitted to the jury and determined by the judgment of the appellate court, it will not be reviewed by this court. *Pennsylvania Co. v. Sloan*, 337.
6. **CONTROVERTED QUESTIONS OF FACT WILL NOT BE REVIEWED** where submitted to jury and decided below. *Nichols v. Sargent*, 378; *Chicago etc. Ry Co. v. West*, 380.
7. **APPEAL LIES TO SUPREME COURT WHERE VALIDITY OF A STATUTE OR CONSTRUCTION OF THE CONSTITUTION IS INVOLVED**, and motion to dismiss appeal for want of jurisdiction will be overruled where such question of proper construction is directly raised on face of record. *County of Cook v. Industrial School*, 386.
8. **APPEAL BY ONE PARTY TO AN ACTION, WHERE THE INTERESTS OF ALL PARTIES ARE INSEPARABLY CONNECTED**, removes the case to appellate court for all, and gives that court jurisdiction to render judgment against all; this rule applies to an action against principal debtor and his sureties on their joint and several promissory note. *Wilcox v. Raben*, 207.
9. **DECREE, THOUGH ERRONEOUS, WILL NOT BE DISTURBED**, no objection thereto having been made by the party to be affected. *Shirley v. Burch*, 273.
10. **MICHIGAN STATUTE, ACT NO. 101, LAWS OF 1885**, whereby party aggrieved may assign errors upon the charge of the trial court without taking exceptions on the trial, is remedial, and was intended to apply to cases then pending as well as to those thereafter to be commenced. *Hufford v. Grand Rapids etc. R. R. Co.*, 859.

ARSON.

1. **A DEMOLISHED BUILDING IS NOT A "HOUSE,"** so as to be the subject of ARSON, within a statute which defines such "house" as "any building or structure inclosed with walls, and covered." *Mulligan v. State*, 435.
2. **BURNING OF PREMISES LEASED BY ACCUSED—INDICTMENT.** — Where accused is a tenant, entitled to occupancy and possession, he is a part owner, and occupies such a relation to the premises as requires that the indictment should allege the particular facts making him amenable to prosecution for arson in case such house has been burned by him: Texas Penal Code, arts. 658-660. *Id.*
3. **INDICTMENT IS SUFFICIENT** which charges in first count that defendant burned his own house, the said house being at the time insured; and in the second count that he burned his own house, thereby endangering the safety of houses belonging to other persons. It is unnecessary, in such case, to allege the amount of the insurance upon the house, the company in which it was insured, or other facts in relation to the insurance, nor who owned the houses which were endangered by the burning of defendant's house. *Baker v. State*, 427.

4. **THE LOCUS IN QUO OF A HOUSE BURNED IS SUFFICIENTLY ALLEGED** where it is set forth as "a certain house then and there owned by him the said" defendant, the words "then and there" referring to a time and county previously stated. *Id.*

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ATTACHMENT.

1. **GARNISHMENT OF PROPERTY NOT IN THE STATE.** — One cannot be charged as garnishee in respect to promissory notes or other evidences of indebtedness executed by third parties and belonging to the defendant in the attachment, which at the time of the service of the garnishee process and during the pendency of the suit were in another state. *Bowen v. Pope*, 330.
2. **SERVICE OF NOTICE UPON THE GARNISHEE CREATES A LIEN** on the goods of the debtor in his hands, and such goods are not subject to levy and sale upon process thereafter levied during the continuance of such attachment lien. *Northfield Knife Co. v. Shapleigh*, 224.
3. **ACTION IN EQUITY WILL LIE TO DETERMINE PRIORITY OF LIENS AND FOR AN INJUNCTION** till final hearing, where there has been service of notices upon garnishee, and other creditors, who have obtained judgments and levied executions upon the garnished property, threaten to sell the same under execution. *Id.*
4. **COURT MAY APPOINT RECEIVER TO TAKE CHARGE OF GOODS WHERE GARNISHEE ABANDONS THE PROPERTY**, or where he declines to retain the same in his hands. *Id.*
5. **GARNISHMENT.** — **ISSUE OF WRIT OF GARNISHMENT, FOR PURPOSE OF ATTACHING** the amount due on a policy of insurance, is not premature because at the time of its issuance no proof of loss had been made, and by the terms of the policy proof of loss was required before the company could be held liable to pay. Writ of garnishment is not, strictly speaking, an action for the recovery of a debt, but is more in the nature of a bill of discovery, and may be filed in anticipation that a debt or other obligation will mature at some future time. *Phenix Ins. Co. v. Willis*, 566.
6. **WHEN PLAINTIFF CONTESTS ANSWER OF GARNISHEE, SPECIFYING** in what particulars he believes it untrue, under oath, it is not necessary that the allegations upon which the issue is made up should be sworn to. *Id.*
7. **UPON GIVING THE STATUTORY BOND TO RELEASE PROPERTY FROM ATTACHMENT**, the attachment is dissolved, and the action proceeds to judgment *in personam*. *Bunneman v. Wagner*, 306.
8. **DEATH OF A DEFENDANT AFTER THE WRIT HAS BEEN LEVIED**, and a statutory bond given for the release of the property, does not discharge the sureties on such bond from liability. *Id.*
9. **WHETHER THE INSTRUMENT GIVEN TO PROCURE THE RELEASE OF AN ATTACHMENT IS A BOND OR AN UNDERTAKING IS IMMATERIAL.** — An ac-

- tion brought upon the former instrument is governed by the same principles as if brought upon the latter. *Id.*
10. **IF CREDITOR VOLUNTARILY CONSENTS TO DISSOLVE ATTACHMENT** levied upon the goods of his debtor, and relinquishes his lien at the request of any one, the promise of such person to pay the debt thus secured is made upon a valid consideration. The surrender of the lien being a detriment to the creditor is a sufficient consideration for the promise, but to enforce such promise or engagement, it is indispensable that it be in writing. *Id.*
 11. **UNDERTAKING IN WRITING, WHEREBY ONE PROMISES AND AGREES** to pay the amount of any judgment which the plaintiff might recover against the defendant in an action, is founded upon a valid legal consideration which the defendant receives by the surrender of the property attached in the action, and such undertaking is good as a common-law obligation. *Id.*
 12. **BONDS INTENDED TO BE GIVEN IN COMPLIANCE WITH STATUTES**, although not so given, if entered into voluntarily, and founded upon a valid consideration, and not in violation of public policy or contravening any statute, will be enforced by common-law remedies. *Id.*
 13. **BOND OR UNDERTAKING GIVEN TO OBTAIN RELEASE** of property seized upon attachment is not rendered invalid by irregularities in making such attachment. The undertaking having served its purpose to secure the release of the property attached, liability thereon will not be defeated by irregularities in making the attachment. *Id.*
 14. **IT IS NOT ESSENTIAL THAT COMPLAINT SET OUT** all the facts which authorize the issuing of an attachment. *Id.*
 15. **LEVY OF ATTACHMENT IS NOT DISSOLVED** by the death of the defendant, unless some statute expressly so declares. *Mitchell v. Schoonover*, 282.
 16. **IF AN INDEBTEDNESS IS DISCLOSED** by the garnishee, but he also discloses the fact of a claim thereto by a third person as assignee, it is error for the court to order judgment against the garnishee until the claimant is duly cited and made a party; and unless this be done, the rights of such claimant cannot be barred or affected by the judgment. *Levy v. Miller*, 691.
 17. **JURISDICTION. — ORDER MADE BY COURT DIRECTING THAT ALLEGED CLAIMANTS** of a debt garnished "be made parties, and that notice be served on them," but not prescribing how the notice should be served, is to be construed as meaning personal service within the state, and no other service is sufficient to confer jurisdiction over the absent and non-resident claimants. *Id.*
 18. **SHERIFF IS PROTECTED IN MAKING LEVY** under a writ of attachment valid and regular, and it is his duty to make the levy, however full his knowledge may be of the insufficiency of the cause of action on which the writ issued, or of the wrongful and malicious intent of the party in suing out the writ. *Rice v. Miller*, 630.
 19. **DEFENDANT IN ATTACHMENT WRONGFULLY SUED OUT**, though there was NO ACTUAL SEIZURE of his property, if the levy was such as to place it in the custody of the law, is entitled to recover such actual damages as result to him from being virtually dispossessed of his property during the time the levy was continued in force, and if there was malice in issuing the process, he is entitled to recover exemplary damages. *Id.*

AUCTION.

PRESCRIPTION OF FIVE YEARS CURES ALL INFORMALITIES IN PUBLIC SALE made at public auction, and this bar is perfect and complete in respect to minors, married women, or interdicted persons. *Linman v. Riggins*, 549.

BANKS AND BANKING.

1. **IT IS NO PART OF BUSINESS OF BANK TO LOAN MONEY** for the public or for individuals, and in the absence of proof that a bank was engaged in such business, it must be presumed that its teller, in making a loan of a customer's money, was acting outside of the scope of his authority as agent of the bank, and no liability attaches to the bank for the acts of its teller in making the loan. *City National Bank v. Martin*, 632.
2. **BANK IS BOUND BY ACT OF ITS TELLER IN COLLECTING** a note delivered to him as agent of the bank for collection, it being shown that he had on other occasions made collections for the bank, and the collection being made within the apparent scope of his authority. *Id.*
3. **KNOWLEDGE OF BANK-TELLER RELATIVE TO THE COLLECTION OF MONEY** and the ownership of notes left with him for collection must be imputed to the bank, and notice to him is notice to the bank. *Id.*
4. **BANK HAVING HELD OUT ITS OFFICER TO THE WORLD AS WORTHY OF confidence**, it will not be permitted to profit by the frauds he may be thus enabled to perpetrate in the apparent scope of his employment. *Id.*
5. **MINNESOTA ACT OF 1881, prohibiting any banking corporation created under the laws of that state from making loans or discounts on the security of the shares of its own capital stock**, is effectual to prevent such corporation from having a lien upon the stock, as security for such a loan or discount made subsequent to that enactment, notwithstanding a by-law of the corporation adopted prior to that statute had provided for such a lien. *Nicollet Nat. Bank v. City Bank*, 643.
6. **ALTHOUGH SHARES OF STOCK IN BANKING CORPORATION ARE BY STATUTE MADE TRANSFERABLE** only on the books of the bank, yet as between the immediate parties an assignment without such transfer is effectual, and will be recognized and enforced, at least in equity, as against all parties not showing a superior right. *Id.*
7. **ASSIGNMENT BY STOCKHOLDER OF SHARES OF BANK STOCK**, made for the purpose of collateral security, and although made without a transfer on the books of the bank, as required, is effectual as against the bank, asserting a lien for a debt of the stockholder, contrary to the provisions of statute; and the refusal of the bank, because of such asserted lien, to make the proper transfer on its books, subjects it to liability to the assignee in an action for damages as for the conversion of the stock. *Id.*
8. **ATTACHMENT OF SHARES OF BANK STOCK BY BANK**, after notice of an assignment of the shares, made without a transfer on the books of the bank, is ineffectual to defeat the prior right of the assignee. *Id.*
9. **ACCOUNTS BETWEEN BANKS, LIEN FOR BALANCE DUE ON.** — Where there have been for several years mutual and extensive dealings between two banks, and an account-current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection when received, and charged all costs, and accounts were regularly transmitted from one to the other, and settled upon these principles, and upon the face of the paper transmitted it always appeared to be the property of the respective banks, and to be remitted

by each of them upon its own account, there is a lien for a general balance upon the paper thus transmitted, no matter who may be its real owner. *Carroll v. Exchange Bank*, 101.

10. **BANKER'S LIEN.** — If a receiving and collecting bank, at the time of mutual dealings with the bank sending paper, has notice that such bank has no interest in the paper transmitted, and that it transmits such paper merely as agent, then the collecting bank is not entitled to retain against the bank transmitting the paper for the general balance of the account with such bank. *Id.*
11. **BANKER'S LIEN.** — If a collecting bank has no notice that the bank sending the remittance was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the collecting bank is not entitled, as against the real owner, to a lien for general balance of account, unless credit was given to the bank sending the paper, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of dealings between the two banks. *Id.*
12. **BANKER'S LIEN.** — If, in mutual dealings between banks, the collecting bank regarded and treated the bank transmitting negotiable paper as the owner of such paper transmitted for collection, and had no notice to the contrary, and upon the credit of such transmittance, made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the bank making the remittance, to be met by the proceeds of such negotiable paper, then the collecting bank is entitled to a lien against the real owner of such paper, for the balance of account due from the bank transmitting such paper. *Id.*
13. **THE DIRECTORS OF A BANK ARE PERSONALLY LIABLE**, at the suit of a depositor, for damages sustained by reason of the insolvency of the corporation, when the depositor is induced to place money in the bank solely by false representations of solvency made to the general public by the directors, who ought to have known, and, by the use of ordinary care, such as it was their duty to have exercised, might have known, that such representations were false, and they are so liable whether such representations were made with the intent to defraud or not. *Seale v. Baker*, 592.

BONA FIDE PURCHASER.

See **CLOUD ON TITLE**, 4; **EXECUTIONS**, 14; **EXECUTORS AND ADMINISTRATORS**, 6; **JUDICIAL SALE**, 2; **MORTGAGES**, 2; **VENDOR AND VENDEE**, 3.

BOND.

See **ATTACHMENT**, 7-13.

BURDEN OF PROOF.

See **EVIDENCE**, 6.

CARRIERS.

1. **SLEEPING-CAR COMPANY IS NOT LIABLE AS COMMON CARRIER FOR INJURY TO STRANGER**, who, upon entering one of its cars to ask the privilege of washing his hands, is wantonly and without provocation assaulted and beaten by the porter of the car. There is, in such case, no contractual relation between the stranger and the company, and its responsibility,

if it exists, must be found in the general principles of the law of master and servant as applicable to all masters similarly situated. *Williams v. Palace Car Co.*, 512.

2. PORTER OF SLEEPING-CAR HAS NO AUTHORITY TO ENFORCE RULES and regulations of the company, or to forcibly prevent any person from entering the car, or to expel him therefrom after he has entered, and if he wantonly assaults and beats one who enters the car for a lawful purpose, his act is outside of the functions in which he is employed, and the company will not be liable therefor, unless it had expressly or impliedly authorized the act, or been guilty of knowingly employing a dangerous servant. *Id.*
3. SLEEPING-CAR COMPANY IS NOT NEGLIGENT IN EMPLOYING PORTER who, for three years in its service, had borne a good character for sobriety, amiability, and politeness. *Id.*
4. AGENT'S STATEMENT. — PURCHASER IN GOOD FAITH OF RAILWAY PASSENGER-TICKET HAS RIGHT TO RELY upon the statement of the company's agent who sold him the ticket that it was good, and entitled him to a ride between two stations named, the ticket being a genuine one issued by the company, which the agent had a right to sell to passengers. The ticket constitutes the evidence agreed upon by the parties, by which the company should thereafter recognize the rights of the purchaser in his contract, and is conclusive upon the subject. *Hufford v. Grand Rapids and Indiana R. R. Co.*, 859.
5. PRESUMPTION OF LAW IS, THAT PERSON RIDING ON CONSTRUCTION TRAIN, BY PERMISSION of an employee of a railway company, is not lawfully thereon; but this presumption may be overcome by special circumstances, as where, for instance, the company is in the habit of allowing its employees to ride on such trains to and from their work or their homes. *Rosenbaum v. St. Paul and Duluth R. R. Co.*, 653.
6. PERSON RIDING ON CONSTRUCTION TRAIN IS DEEMED TO CONSENT to and to accept all the usual incidents to such a train running over a side-track constructed in the usual way. But if, through failure of the company to spike the rails, or neglect to keep the track in suitable repair for the temporary purposes for which it was constructed and used, an injury occurs to one lawfully on the train, without fault on his part, he may recover. *Id.*

See RAILROAD COMPANIES.

CERTIORARI.

- TO INVOKE JURISDICTION OF SUPREME COURT UNDER CERTIORARI AND PROHIBITION, RELATOR MUST ESTABLISH one of three things: 1. That the proceedings are infected with some fatal irregularity rendering them absolutely void; or 2. That the jurisdiction of the cause did not belong to the court which assumed it, but to a different court; or 3. That the cause is of a nature jurisdiction of which is denied to any court, because not within the limits of judicial power. *State ex rel. Patton v. Houston*, 532.

CHARACTER.

See CRIMINAL LAW, 5.

CHATTEL MORTGAGE.

See MORTGAGES, 1.

CLOUD ON TITLE.

1. ACTION TO REMOVE will lie by one out of possession against one in the actual possession of the land. *Bausman v. Kelley*, 661.
2. ACTION TO REMOVE IS NOT WITHIN the general statute of limitations, and barred by the lapse of six years, as being an action for relief on the ground of fraud. *Id.*
3. COURT WILL NOT, IN ACTION TO REMOVE, GRANT equitable relief without regarding the equitable claims of the defendant, although the legal title is in the plaintiff. The latter cannot invoke equitable relief and at the same time insist that the court shall not regard any fact in the conduct or relations of the parties which may show his suit to be inequitable and against conscience. *Id.*
4. IF IT IS SHOWN THAT DEFENDANT, IN ACTION TO REMOVE, PURCHASED the land in good faith, for value, under color of title, and without notice, and that he, with his grantors, had been in possession adverse to the real owner for a period of many years, he is entitled to the equitable protection of the court, unless the plaintiff, who had the legal title, was also without fault. *Id.*
5. GRANTEE IN DEED OF LAND ABUTTING ON NAVIGABLE STREAM MAY MAINTAIN ACTION to remove the cloud upon his riparian rights, created by a prior deed to another grantee from the same grantor, purporting to convey the soil under the water and beyond low-water mark. *Lake Superior Land Co. v. Emerson*, 679.

See ADVERSE POSSESSION.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE, 1.

CONCEALED WEAPONS.

See CRIMINAL LAW, 4.

CONCLUSIVENESS.

See JUDGMENT, 11-13.

CONFLICT OF LAWS.

ACTION TO COMPEL RETURN OF PROPERTY TO STATE—POWER OF RECEIVER.

—Equity will not compel an insolvent defendant, in an action of detinue instituted in West Virginia, to return to that state, nor will it appoint a receiver to bring back the property in dispute to answer the judgment in detinue, where the defendant had, before the commencement of the latter action, sold or pledged such property in good faith to a resident of another state, and placed him in possession thereof, which he has since retained, though such property was forwarded to him to prevent its recovery in an action of detinue which might be brought in West Virginia, where the parties resided. *Straughan v. Hallwood*, 29.

CONSPIRACY.

1. COMMON DESIGN.—“ALL PERSONS ARE PRINCIPALS WHO ARE GUILTY OF ACTING TOGETHER in the commission of an offense,” under the Texas Penal Code, article 74; actual presence is not necessary if at the time of commission the absent party is doing his part in connection with

- a furtherance of the common design; and all persons are principals who procure aid, arms, or means of any kind to assist in committing the offense, while others are executing the unlawful act, or who endeavor to secure the safety or concealment of the offenders at the time of the commission of the offense: Texas Penal Code, art. 76. *Phillips v. State*, 471.
2. EACH PARTY IS CRIMINALLY RESPONSIBLE FOR ACTS OF HIS ASSOCIATES COMMITTED IN FURTHERANCE OF THE COMMON DESIGN when such parties combine together to commit any unlawful act. *Id.*

CONSTITUTIONAL LAW.

1. LEGISLATURE MAY PROVIDE FOR THE PAYMENT FOR MATERIALS FURNISHED AND SERVICES RENDERED FOR THE BENEFIT OF THE STATE, and at the instance of its officials, though they were not at the time acting within the limits of their authority, notwithstanding the provisions of section 19, article 3, of the constitution of New York, declaring that "the legislature shall neither audit or allow any private claim or account against the state, but may appropriate money to pay such claims as shall have been audited and allowed according to law." *O'Hara v. State of New York*, 726.
2. LEGISLATURE MAY AUTHORIZE THE PAYMENT OF A CLAIM AGAINST THE STATE NOTWITHSTANDING THE LAPSE OF TIME, if at the time when the claim was incurred the claimant could not have maintained any action against the state thereon, and this is true notwithstanding the provision of article 7, section 14, of the constitution of New York, declaring that "neither the legislature, canal board, canal appraisers, nor any person or persons acting in behalf of the state, shall audit, allow, or pay any claim which, as between citizens of the state, would be barred by lapse of time." As the claim was not, until the passage of the statute authorizing suit to be brought thereon, a claim such as between citizens of the state would be barred by lapse of time, it does not come within this provision of the constitution. A statute of limitation can never commence to run until a cause of action has accrued, although there may before that time be an imperfect obligation existing in favor of the plaintiff. *Id.*
3. CONSTITUTIONAL PROVISION THAT PARTY ACCUSED SHALL HAVE RIGHT TO BE CONFRONTED with the witnesses against him does not apply to the proof of facts in their nature essentially and purely documentary, and which can only be proved by the original, or by a copy officially certified. *People v. Dow*, 873.

See HOMESTEAD, 1; SCHOOLS, 1, 2, 5.

CONTRACTS.

1. CONSTRUCTION. — Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; but where its meaning is obscure, and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, under proper instructions. *Coquillard v. Hovey*, 134.
2. IN INTERPRETING WORDS IN A CONTRACT of which there is an uncertainty, whether they were used in an enlarged or restricted sense, that construction should be adopted which is most beneficial to the covenantee. *Paul v. Travelers' Ins. Co.*, 758.

3. A DRUNKARD IS NOT AN INCOMPETENT, LIKE AN IDIOT, or one generally insane. His incompetency can only be established by showing that at the time of the act in question, his understanding was clouded, or his reason dethroned by actual intoxication. *Wright v. Fisher*, 886.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 16, 17, 20, 21.

CORPORATIONS.

1. DIRECTORS OF CORPORATION ARE TRUSTEES for the corporation, and within the rule that one holding a fiduciary relation to trust property cannot, either directly or indirectly, become the purchaser of such property, or transfer it to his own use, or for his own benefit, and if he does, the sale or transfer is voidable, and will be set aside at the mere pleasure of the beneficiaries, though such fiduciary may have paid full price and gained no advantage. *Sweeney v. Grape Sugar Company*, 88.
2. CORPORATE STOCK. — DIVIDENDS BELONG TO THE OWNER OF THE STOCK AT THE TIME THEY ARE DECLARED, although they are made payable at a future date. This rule cannot be displaced or overcome by evidence showing a usage of the stock exchange to the contrary. *Hopper v. Sage*, 771.

See FRAUDULENT CONVEYANCES, 1-3; QUO WARRANTO.

COSTS.

1. A NATION OR STATE IS A BODY POLITIC, CONSTITUTING a legal entity, and capable of acquiring and enjoying property, and protecting itself from injury thereto in the courts of foreign countries. *Republic of Honduras v. Soto*, 744.
2. SECURITY FOR COSTS MAY BE EXACTED FROM A FOREIGN INDEPENDENT GOVERNMENT suing in the courts of this state. Such government is a person within the meaning of the statute authorizing the court to require security for costs, when the plaintiff is a person residing without the state. *Id.*
3. FURTHER SECURITY CANNOT BE EXACTED under section 3272 of the code of New York, when a deposit of money has already been made in lieu of an undertaking as security for costs. *Id.*

CRIMINAL LAW.

1. ON SEPARATE TRIAL OF ONE OF TWO RESPONDENTS JOINTLY INFORMED AGAINST for burglary, the testimony of a witness to a conversation had with the respondent not on trial, soon after the burglary, in the presence and hearing of his co-respondent, during which both the respondents gave the witness money with which to buy railway tickets to Rochester, New York, and in which the respondent not on trial said he did not wish to buy the tickets for fear of arrest as a suspicious character, is competent and admissible, the respondent on trial being equally interested with the other in the purchase and use of the tickets. *People v. Dow*, 873.
2. FELONY. — BURDEN OF PROOF NEVER SHIFTS FROM THE STATE TO DEFENDANT, but is upon state throughout. *Phillips v. State*, 471.
3. VOLUNTARY STATEMENTS ARE INADMISSIBLE AS INCUHPATORY EVIDENCE AGAINST ACCUSED WHEN MADE BY HIM UNDER ARREST, WITHOUT BEING

FIRST CAUTIONED that any statement he made might be used in evidence against him. The fact that a few hours prior to making such statements the magistrate before whom the charge was being investigated cautioned him that a voluntary statement, if made, might be used in evidence against him, does not dispense with a caution with respect to statements subsequently made on another occasion to another party, and under entirely different circumstances. *Baker v. State*, 427.

4. **STATE STATUTE PROHIBITING CARRYING OF PISTOL IS NOT APPLICABLE TO UNITED STATES SOLDIER** engaged in the actual discharge of his duties as such; otherwise he is amenable to the law to the same extent and under the same rules as any other individual. *Lann v. State*, 445.
5. **EVIDENCE OF GENERAL CHARACTER OF ACCUSED IS ADMISSIBLE IN HIS BEHALF, WHERE CRIMINAL INTENT IS NECESSARY TO constitute offense,** and this rule applies to an offense of unlawfully carrying a pistol. *Id.*
6. **HOUSE IS NOT DISORDERLY WITHIN INHIBITION OF STATUTE BECAUSE PROSTITUTES AND VAGABONDS RESORT THERE TO BUY AND DRINK BEER,** it appearing that accused was engaged in carrying on a legitimate business. *Harmes v. State*, 470.
7. **SUNDAY. — LABOR IN OPERATING ICE FACTORY MAY BECOME A "WORK OF NECESSITY,"** within exception in a statute which otherwise prohibits laboring on Sunday. *Hennersdorf v. State*, 448.
8. **OBJECT OF ASSIGNMENTS OF ERROR IS TO POINT OUT SPECIFICALLY** what is relied upon as error, and this is accomplished by an assignment which, in terms, assigns error upon the refusal to give each and every one of defendant's requests to charge. *People v. De Fore*, 863.
9. **ASSIGNMENT OF ERROR WHICH IS TOO GENERAL** cannot be considered. *Id.*
10. **WHERE TESTIMONY IN CRIMINAL PROSECUTION FOR SEDUCTION SHOWS NO OTHER INDUCEMENT or motive than a promise of marriage, except it might be the mutual desire of the parties, to which the court called the jury's attention, charging that if such was the motive the respondent was not guilty, a request to instruct the jury that, if they find from the evidence that there was any other inducement or motive which led the prosecutrix to submit herself to the respondent except the promise of marriage, they should find him not guilty, is properly refused.** *Id.*
11. **OFFENSE OF SEDUCTION CREATED AND PUNISHABLE BY MICHIGAN STATUTE IS COMMITTED** if the man has carnal intercourse to which the woman assented, if such assent was obtained by a promise of marriage made by the man at the time, and to which without such promise she would not have yielded. *Id.*
12. **ACT OF INTERCOURSE INDUCED SIMPLY BY MUTUAL DESIRE** of the parties to gratify a lustful passion does not constitute the crime of seduction. *Id.*
13. **CRIME OF RAPE IS NOT EMBRACED IN THAT OF SEDUCTION,** and it would be improper, in a trial for seduction, to instruct the jury upon the law relative to the former crime. But the judge should instruct the jury, in a trial for seduction, that if the prosecutrix did not assent to the act of intercourse, the offense was not committed. *Id.*
14. **IN CRIMINAL PROSECUTION FOR SEDUCTION, WEIGHT OF EVIDENCE AND CREDIT TO BE GIVEN** to testimony of the prosecutrix are questions exclusively for the jury, and it is error for the court to charge that they should consider any facts testified to by her as established simply because she had testified to them, and had not been contradicted. *Id.*

15. IT IS DUTY OF TRIAL JUDGE IN CRIMINAL CASE TO INSTRUCT JURY IN REFERENCE to the presumptions of law applicable to the case before them, distinguishing those which are conclusive from those which are disputable. *Id.*
16. PRESUMPTION OF INNOCENCE IS PRESENT IN EVERY CRIMINAL CASE, and the jury should be instructed to that effect, and that such presumption stands good until overcome by evidence which convinces them beyond a reasonable doubt that the respondent is guilty. *Id.*

See ARSON; MAIMING.

CROPS.

See DAMAGES, 6.

DAMAGES.

1. IN ACTION ON BOND GIVEN AS GUARANTY FOR PAYMENT OF COMMERCIAL PAPER sold to plaintiff, where such bond limits the time within which the notes and securities mentioned therein should be paid, and contains a further limitation that the amount of loss or default to be chargeable to the sureties the damages should not exceed five thousand dollars, is the aggregate amount or face value of the negotiable securities delivered to and received by the plaintiff in good faith within the time limited by the terms and conditions of said bond, and remaining unpaid at the time of the commencement of the suit, not exceeding in the aggregate the sum of five thousand dollars, with interest. *Lombard v. Mayberry*, 234.
2. ATTORNEY'S FEES AS ELEMENT OF DAMAGES. — In Nebraska, vindictive or exemplary damages are not allowed. Therefore, attorneys' fees as an element of damages in an action in tort cannot be recovered. *Winkler v. Roeder*, 155.
3. IN ACTION FOR PERSONAL INJURIES TO MINOR, BROUGHT FOR HIS BENEFIT by a next friend, the damages which diminish his capacity to earn a living must be limited to the period after his majority, for until that period is reached he is not entitled to the proceeds of his own labor. But if there is no complaint that the verdict of the jury in favor of the plaintiff was excessive, the judgment will not be reversed because of the failure of the court in its charge to thus limit the liability of the defendant. *Houston and Texas Central R'y Co. v. Boozer*, 615.
4. MEASURE OF IN ACTION FOR CONVERSION OF PROMISSORY NOTE, in the absence of other evidence, is the face of the note with interest. *Hersey v. Walsh*, 689.
5. IF SURFACE WATER IS WRONGFULLY TURNED UPON THE LAND OF ANOTHER, as the result of the joint acts of several parties, each may be sued for the entire damage; but if the damage caused is the combined result of the acts of several, acting independently, each is liable in proportion to his contribution to the nuisance, and not otherwise. *Sloggy v. Dilworth*, 656.
6. PROPER MEASURE OF, FOR DESTRUCTION OR LOSS OF GROWING CROPS is in general the value of the crops standing upon the ground, and not the loss as measured by the rental value of the land. *Byrne v. Minneapolis etc. R'y Co.*, 668.
7. IN COMMON-LAW ACTION AGAINST A RAILWAY COMPANY TO RECOVER FOR DAMAGES RESULTING from the shutting off of light from the

plaintiff's premises by the maintenance of an elevated railway in front thereof, the plaintiff's recovery must be restricted to the damages sustained prior to the commencement of the action. The fact that they will probably continue permanently cannot be taken into consideration. The plaintiff, in the event of their continuance, must seek redress in subsequent actions. *Pond v. Metropolitan Elevated R'y Co.*, 734.

8. **LIMITING BELIEF OF JURY AS TO WHAT TESTIMONY SHOWS.** — INSTRUCTION in action for personal injury, that if the jury "find the defendant guilty," they shall assess his damages, etc., proceeding to state the elements that may be considered in fixing the amount, ending with the words "as shown by the testimony," does not warrant the criticism that such amount is not limited to the jury's belief as to what the testimony shows, but allows any amount to be assessed. The finding defendant guilty presupposed a belief from the evidence in the truth of the facts referred to in previous instructions, which stated that if certain facts were found true it would be guilty. *Pennsylvania Co. v. Sloan*, 337.

See **LIBEL AND SLANDER**, 1; **NEGLIGENCE**, 8; **PAYMENT**.

DEBTOR AND CREDITOR.

- RIGHTS OF DONEE IN POSSESSION UNDER PAROL GIFT OF LAND.** — Where a debtor makes a parol gift of land, and the donee goes into possession and makes improvements on the strength of it, claiming the land as his own, and afterwards receives a deed for the land in accordance with the gift, a creditor of the donor cannot, after the latter becomes insolvent, attach the land and subject it to the payment of his claim, credit for which was extended after the date of the parol gift, and after the donee was in the actual occupancy of the premises. *Willis v. McIntyre*, 574.

See **PAYMENT**.

DEEDS.

1. **IF TRUE OWNER OF LAND CONVEYS BY ANY NAME**, the conveyance, as between the grantor and grantee, will transfer title, although the grantor executed the deed of conveyance under an assumed name, or the scrivener who draughted the instrument made a mistake in his christian name, and evidence *aliunde* the instrument is admissible to identify the actual grantor. *Wakefield v. Brown*, 671.
2. **AN EXCEPTION IS A WITHDRAWAL** from the operation of the grant of some part of the thing granted, and if valid, the title to the thing excepted remains in the grantor, as if no grant had been made. *Eisely v. Spooner*, 128.
3. **RESERVATION IN A DEED** is of some new thing issuing out of what is granted, and while not affecting the title to what is granted, may reserve to the grantor a right to the use or enjoyment of a part thereof. *Id.*
4. **CONVEYANCES OF LAND**, under the Compiled Statutes of Nebraska of 1887, chapter 73, sections 50 to 53, pass all interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used; and in construing them it is the duty of the court to carry into effect the true intent, as far as such intent is consistent with law. *Id.*

See **HUSBAND AND WIFE**, 2, 3; **VENDOR AND VENDEE**, 5, 6.

DIRECTORS.

See BANKS AND BANKING, 13; CORPORATIONS.

DISORDERLY HOUSE.

See CRIMINAL LAW, 6.

DIVORCE.

1. DECREE OBTAINED BY FRAUD MAY BE SET ASIDE on motion after term rendered by court having jurisdiction, as in case of other judgments. *Wisdom v. Wisdom*, 215.
2. PAYMENT OF ALIMONY AFTER DEATH OF HUSBAND. — Consent decree, which provides for payment to divorced wife, "so long as she may be and remain sole and unmarried," is binding upon the husband during his lifetime, and upon his estate after his decease, so long as the wife remains unmarried, and especially so where bond given to secure the payment is made binding upon the obligor, his heirs, executors, and administrators, and a trust deed to secure the bond also recites the conditions of the bond. *Storey v. Storey*, 417.

DOCUMENTARY EVIDENCE.

See EVIDENCE, 7-15.

DOMICILE.

See ELECTIONS, 35-38.

DRUNKARDS.

See CONTRACTS, 3.

EASEMENTS.

See WATERS, 3.

EJECTMENT.

ACTION TO DETERMINE ADVERSE CLAIM TO LAND MAY BE MAINTAINED by one in possession thereof, without other proof of his interest in the land. *Knight v. Alexander*, 675.

ELECTIONS.

1. COUNTY COURT IN ILLINOIS HAS JURISDICTION TO HEAR AND DETERMINE ELECTION CONTEST concerning the office of county treasurer, and such proceeding should be heard at the probate term. *Kreitz v. Behrensmeyer*, 349.
2. PROCEEDING TO CONTEST AN ELECTION IS NOT A SUIT AT LAW. *Id.*
3. PETITION IN PROCEEDING TO CONTEST ELECTION need not show names of persons whose ballots have been improperly counted, where the contest concerns a county office, and the ground of action is a miscount or neglect to properly count the ballots by the judges of election. *Id.*
4. IDENTITY OF BALLOTS IN ELECTION CONTEST — WAIVER OF RIGHT TO DEMUR. — Although petition is demurrable because it does not specifically show the identity of certain ballots sufficiently to warrant a decree for

their examination, yet if a party answers, makes an issue of fact, and gives evidence upon the general and indefinite as well as the specific allegations of the bill, he waives the objection. *Id.*

5. ELECTION CONTEST. — ORDER WILL BE MADE THAT BALLOTS BE RECOUNTED if petitioner makes a *prima facie* case that there is a necessity therefor, and that they have not been tampered with. *Id.*
6. ELECTION CONTEST. — LESS PARTICULARITY IS REQUIRED IN ANSWER OF DEFENDANT THAN IN PETITION. *Id.*
7. BURDEN IS UPON PETITIONER ALLEGING ELECTION TO OFFICE to prove that a majority of legal votes were cast for him, and the production of ballots cast for him raises presumption *prima facie* that they were legal. *Id.*
8. IN ELECTION CONTEST, PRESUMPTION THAT BALLOTS FOR PETITIONER WERE LEGAL may be overcome by evidence in rebuttal that such ballots were not those of legal voters when the allegation of election to office is denied by answer. *Id.*
9. ELECTION CONTEST — WAIVER OF OBJECTION TO PLEADINGS — EVIDENCE. — Answer is subject to exception which alleges in general terms, without more specific mention, that ten illegal votes were cast for contestant, but the right to object to evidence relating to such votes is waived where no objection is raised to such indefinite allegations. *Id.*
10. PAROL EVIDENCE TO CONTRADICT OR CHANGE BALLOT. — In election contest, witness may testify in rebuttal upon issue properly raised by the pleadings that he had voted a ballot designated by a certain number, may state whose name was on the ballot, and that its condition when recounted was different than when voted, as that it had been changed by a paster, or that the ballot was destroyed after it was cast, and another and different one put in its place. *Id.*
11. IT WILL NOT BE CONSTRUED AS AN ADMISSION PRECLUDING CONTESTEE FROM SHOWING THAT BALLOTS RECOUNTED WERE NOT GENUINE or were changed during the recount, where before the recount contestant stated to contestee that if any question as to identity of ballots cast with those to be recounted were made, the contestant wanted a judge or clerk of the district present, and that contestee making no question as to said identity, the recount proceeded without such judge or clerk being present. *Id.*
12. ORDER TO RECOUNT BALLOTS DOES NOT CONCLUDE ALL INQUIRY as to whether they were really the ballots cast, or that they have the same names upon them as when cast. *Id.*
13. PAROL EVIDENCE TO SHOW THAT BALLOT IS MISSING. — It may be shown in rebuttal that a ballot designated by number was voted for a certain candidate, and that at the time of recount there was no such ballot among the ballots of that precinct. *Id.*
14. PAROL EVIDENCE THAT NO BALLOTS WERE RETURNED CORRESPONDING TO NUMBERS ON POLL-BOOKS. — It may be shown that certain persons were electors, for whom they voted, that each name appeared on the poll-books as having voted, and that no corresponding ballots were returned in the box. *Id.*
15. IN ELECTION CONTEST, THE TIME OF OFFERING EVIDENCE IS UNIMPORTANT, where court at opening of trial states that offers of certain testimony might be made during the progress of the hearing, but that it would not hear or admit any such testimony at any time, such ruling being then excepted to by counsel. *Id.*

16. WHERE STATUTE REQUIRES BALLOTS TO BE NUMBERED, IT WILL BE PRESUMED THAT OFFICERS DO THEIR DUTY until the contrary is shown, and that ballots were numbered as they were cast, and where no ballots were returned in the box corresponding to the required numbers, it will be presumed that they have since been abstracted or lost from the ballot-box. *Id.*
17. WHERE STATUTE REQUIRES BALLOT TO BE NUMBERED, AND NO BALLOTS ARE RETURNED CORRESPONDING TO THE REQUIRED NUMBERS, it may be explained by evidence that they were omitted to be numbered, or were inaccurately numbered through mistake. *Id.*
18. DESTROYING UNNUMBERED BALLOTS. — Where the statute provides that before an unnumbered ballot shall be rejected it shall be ascertained by the judges of election that the number of ballots in the box exceeds the number of names entered on each of two poll lists required by law to be kept, it will be presumed on a recount that the judges discharged their duty, and if there is an unnumbered ballot, that the poll lists did not agree; in such case it is erroneous for the court to destroy one of two unnumbered ballots without ascertaining whether the poll lists did agree. *Id.*
19. DESTROYING UNNUMBERED BALLOTS. — Where the statute contemplates that ballots shall be correctly numbered, and that every ballot cast will have the voter's number thereon, a ballot unnumbered is improperly in the box, and should be destroyed; otherwise, if such ballot was actually cast by a legal voter. *Id.*
20. VOTER MAY NOT TESTIFY AS TO WHAT FAMILY RECORD CONTAINS RELATIVE TO HIS BIRTHDAY, where he has never heard of such record until after election, and it is directly contrary to his father's prior statements and to the reputation in the family before that time. The record should be produced, and be shown when and by whom made, or if that is impossible, a proved copy should be produced. *Id.*
21. BALLOT CONTAINING NAMES OF TWO PERSONS FOR SAME OFFICE, ONE WRITTEN, THE OTHER PRINTED, SHOULD BE REJECTED under statute providing that "if more persons are designated for any office than there are candidates to be elected," such part of the ticket shall not be counted. *Id.*
22. TWO BALLOTS FOLDED TOGETHER MAY BE REJECTED, one being within the other, and the outside one alone being numbered, the statute requiring the names of the candidates voted for to be all on the same piece of paper; such ballots containing the names of the candidates on each is plainly an attempt to vote twice. *Id.*
23. VOTER WHO KNOWS THAT HIS BALLOT WAS NOT ACCEPTED OR DEPOSITED IN THE BALLOT-BOX MUST INSIST UPON HIS RIGHTS, and furnish the evidence required by statute, to entitle his vote to be received; otherwise, it cannot be counted, notwithstanding he offered such vote to one of the judges, who took it and said "he would see about it." *Id.*
24. EVIDENCE TO EXPLAIN A BALLOT. — IF VOTER HAS USED LETTERS OF A FOREIGN LANGUAGE to express candidate's name, it may be shown what word or words they make. *Id.*
25. EVIDENCE OF VOTER'S INTENTION. — ERASURE OF NAME being shown, it may be proven that it was not done by voter, or that it was the result of accident, and not of intention, but where erasure is deliberate act of voter, it cannot be explained that by it he intended a different result from that implied by law. *Id.*

26. BALLOT WITH ONLY MIDDLE NAME OF CANDIDATE WRONG SHOULD BE COUNTED for him, as John M. Kreitz for John B. Kreitz, the latter being ordinarily known and called John Kreitz, and being the only candidate of that name for the office in question, the former being ordinarily known and called Matt Kreitz, but not being a candidate for any office at that election. *Id.*
27. BALLOT MAY BE COUNTED WHICH CONTAINS CANDIDATE'S SURNAME ONLY, although there are other persons in the county having same surname, it being shown that there was no other person of such name who was candidate for the same or any other office. *Id.*
28. BALLOTS OBSCURELY IMPRESSED AND IMPERFECTLY WRITTEN MAY BE EXPLAINED by evidence that voter intended and attempted to express a certain candidate's name as he understood it, so far as such ballots could, by one able to read them, be given a sound which might be understood to be intended to express such name, or such name as it was pronounced by any number of people. But if there is no similarity of sound between the name as written on the ballot and the candidate's name, as might induce the one to be reasonably mistaken for the other, or to indicate that it was intended as a contraction for candidate's name, the ballots cannot be aided by extraneous proof. *Id.*
29. ALTHOUGH CANDIDATE'S NAME IS WRITTEN ABOVE NAME OF OFFICE ON BALLOT, IT WILL BE CONSTRUED AS A VOTE FOR HIM where the printed name below name of office is erased. *Id.*
30. VOTES ARE INTENDED FOR DIFFERENT OFFICES, INSTEAD OF BEING TWO VOTES FOR ONE OFFICE, although ballot contains the words "For County Treasurer," with candidate's name printed underneath, and under that and above the printed words "For County Superintendent of Schools" another name is written; the candidate's name which is printed under the last-named office being erased. *Id.*
31. EVIDENCE IS NOT ADMISSIBLE TO SHOW FOR WHAT OFFICE VOTE WAS INTENDED, where printed name under the designation "For County Treasurer" is stricken out, and the name of one of the candidates for such office is written below the designation of a different office, and below the name of the candidate therefor. *Id.*
32. CANCELLATION SHOULD NOT BE PRESUMED FROM MERE FACT THAT TORN BALLOT WAS FOUND IN THE BOX, the presumption being that the tearing was accidental, unless it be proved that it was done by the voter and was intentional, when the ballot will be deemed canceled. *Id.*
33. BALLOTS SHOULD NOT BE COUNTED WHERE NAME OF OFFICE IS COMPLETELY CANCELED, although name of one of the candidates is written beneath such canceled name. *Id.*
34. BALLOTS. — THERE IS NO CANCELLATION WHERE CANDIDATE'S NAME IS WRITTEN INTO NAME OF OFFICE, obscuring and partially obliterating it, such fact being susceptible of explanation as being accidental or unintentional. *Id.*
35. RESIDENCE OF VOTER. — INTENT in good faith of voter to make a place his home for all purposes is a determining factor upon question of his residence, although he may know that at the end of a certain period, or at some future time, he must remove elsewhere, and designs so to do. *Id.*
36. FOR THE PURPOSES OF VOTING, A DOMICILE ONCE GAINED DOES NOT CONTINUE UNTIL A NEW ONE IS ACQUIRED, nor does a right to vote at a particular poll or district continue until the right to vote elsewhere is shown. *Id.*

37. WHAT CONSTITUTES ABANDONMENT OF RESIDENCE. — The shortest absence, if intended as a permanent abandonment, is sufficient, although the party may soon afterwards change his intention, but an extended absence, intended all the time as a temporary absence for a temporary purpose, followed by resumption of former residence, is not an abandonment. *Id.*
38. ON THE QUESTION OF INTENTION TO ABANDON RESIDENCE, DECLARATION OF PARTY, THOUGH ADMISSIBLE, IS NOT CONCLUSIVE, but may be disproved by his acts. *Id.*
39. DECLARATIONS OF VOTER SUBSEQUENT TO ELECTION ARE NOT COMPETENT TO PROVE THAT HE WAS DISQUALIFIED TO VOTE. *Id.*
40. ALIEN-BORN WOMAN BECOMES CITIZEN UNDER ACT OF CONGRESS of February 10, 1855, where any such woman who might be naturalized is in a state of marriage to a citizen. The citizenship of a woman thus acquired is not lost by the subsequent death of her husband and her afterwards intermarrying with an alien, and her children under twenty-one also become citizens; but the effect of this naturalization does not extend to members of the family not children. *Id.*
41. SECONDARY EVIDENCE OF THE CONTENTS OF NATURALIZATION RECORDS may be given when such records are destroyed. Such records are no wise different from other records. *Id.*

EQUITABLE ESTOPPEL.

See ESTOPPEL, 1.

EQUITY.

1. PARTY CAN COME INTO COURT OF EQUITY FOR RELIEF after judgment at law only when he has been deprived of a legal right by fraud, accident, or mistake, unmixed with negligence or fault on his part. And it is indispensable in founding a right to such relief that an executor or administrator exhibit a case free from negligence or misconduct on his part. *Brenner v. Alexander*, 301.
2. LACHES. — DELAY FOR TWENTY YEARS TO TAKE ANY ACTION TO SET ASIDE A DEED claimed to have been obtained by fraud is fatal to the complainant, though he was during all that time an habitual drunkard and spendthrift. *Wright v. Fisher*, 886.
3. LACHES. — INCOMPETENCY WHICH WILL EXONERATE COMPLAINANT FROM CONSEQUENCES OF HIS OWN LACHES must be an incapacity of mind preventing him from realizing the nature and consequences of a fraud practiced upon him, or an incapacity of action precluding him from taking the necessary steps to right the wrong inflicted upon him. The mere fact that he loved liquor so well that he would spend all the money he could get hold of to gratify his appetite is not sufficient, if he had sober intervals during which he was possessed of mind adequate to understand his rights and to move for their enforcement. *Id.*
4. TO CONSTITUTE LACHES, THERE MUST HAVE BEEN KNOWLEDGE, actual or imputable, of the facts which should have prompted a choice either to diligently seek equitable relief, or thereafter to be content with such remedies as a court of law might afford, or if there was actual ignorance, that must have been without just excuse. *Bausman v. Kelley*, 661.
5. IF REAL OWNER OF LAND, KNOWING THAT THE RECORD IS MADE TO SHOW that his title has been divested, desires the aid of equity, he should seek it

with reasonable diligence, and relief will be refused if, through his unreasonable delay, equities have intervened in favor of others. *Id.*

6. **MARSHALING ASSETS — SUBROGATION.** — Creditor who has two funds open to him, while another creditor has but one, cannot take the latter fund without placing that one exclusively within his reach at the disposal of the creditor whom he has deprived of the means of payment. If he refuses or neglects to fulfill this duty, equity will decree subrogation. *Hudkins v. Ward*, 22.
7. **MARSHALING ASSETS.** — Rule that when a creditor has a lien on two funds, and another creditor has a subsequent lien on one of the funds only, equity will require the former to resort, in the first instance, to the fund upon which the subsequent creditor has no lien, for the satisfaction of his debt, is subject to the qualifications that such course must appear to be necessary for the payment and satisfaction of both debts, and must not operate to prejudice the rights of the first creditor to the double fund. Neither must there be any reasonable doubt of the sufficiency of the one fund to satisfy the debt of the first creditor. *Id.*
8. **MARSHALING ASSETS — SUBROGATION.** — Where creditor can resort to two funds for payment, while another creditor can resort to but one of them, the first creditor cannot be delayed in enforcing his debt, but may resort to the fund most easily accessible, and the other creditor who has been prevented from resorting to that fund must take his place as to the other. *Id.*
9. **SUPPLEMENTAL BILL** based on facts occurring since the institution of the suit, seeking relief only as against the original defendant, is in the nature of an amendment to the original bill, and must be read with it, and regarded as one bill. *Straughan v. Hallwood*, 29.
10. **SUPPLEMENTAL BILL.** — When on filing the original bill the plaintiff has no cause of action, he cannot maintain his suit by filing a supplemental bill setting up a cause of action which has accrued since the original bill was filed, though arising out of the same cause of action. *Id.*
11. **SUPPLEMENTAL BILL.** — Where the grounds upon which the original bill was filed are inconsistent and irreconcilable with those upon which the supplemental bill is based, the latter should be dismissed. *Id.*

See ATTACHMENT, 3, 4; CLOUD ON TITLE; CONFLICT OF LAWS.

ESTOPPEL.

1. **EQUITABLE ESTOPPEL — CORPORATION NOT EXEMPT FROM APPLICATION OF PRINCIPLES OF.** — A mutual benefit association, whose charter provides that a particular method of giving notice of assessments falling due shall be a proper notification to all members, is not exempt from the application of the principles of equitable estoppel, which operate upon all other persons, natural or juridical. *Gunther v. New Orleans Cotton Exchange Mutual Aid Association*, 554.
2. **DOCTRINE OF ESTOPPEL — WHEN MAY BE INVOKED IN MATTERS AFFECTING EXECUTION OF CONTRACTS.** — Where a party to a contract has complied with its terms, he has no occasion to invoke the doctrine of estoppel; it is only when the terms have admittedly not been complied with that the question arises whether the other party has, by his representations or conduct, estopped himself from setting up such non-compliance as a ground of forfeiture. *Id.*

ESTRAYS.

See ANIMALS, 1-3.

EVIDENCE.

1. **IRRELEVANCY.** — When there is nothing in the issues presented to warrant the proof offered, it is properly excluded. *Colvin v. Republican B. L. Ass'n*, 114.
2. **IF OBJECTION TO THE ADMISSION OF EVIDENCE** is not shown by the record, it must be presumed that no objection was made. *City Nat. Bank v. Martin*, 632.
3. **IT IS PROPER THAT OBJECT ITSELF** to which testimony relates should be brought into court and exhibited, when this can be done. *Hays v. Gainesville Street R'y Co.*, 621.
4. **EVIDENCE IN THE PARTICULAR CASE NOT DEEMED SUFFICIENT** to establish, with that degree of certainty required by the law, the separate interest of the wife in property conveyed to her after marriage. *Morris v. Hastings*, 570.
5. **TO IDENTIFY DEFENDANT AS SAME PERSON AS ONE SUED BY ANOTHER NAME**, EVIDENCE IS ADMISSIBLE that the name in the original suit was that of a corporation which had been sold out under a foreclosure decree to another company, which continued the business under the same name, merely changing the word "railroad" to "railway"; that thereafter the "railroad" company ceased to do business, but retained its organization for the purpose of clearing up its affairs; that defendant was assignee of the lessee of the "railway" company, and was operating the road at the time of the accident in question; that defendant used signs, cars, and engines with the initials of the "railroad" corporation, and that the same lettering remained on the doors of the ticket and freight offices, with few exceptions; that plaintiff intended to sue defendant and served it with process, and that its attorney defended without pleading the misnomer in abatement. *Pennsylvania Co. v. Sloan*, 337.
6. **BURDEN OF PROOF.** — WHERE USURY IN THE ORIGINAL TRANSACTION FOR WHICH NEGOTIABLE PROMISSORY NOTES WERE GIVEN IS PROVED, a party who claims to have purchased the notes before maturity must assume the burden of proof to show that he is a *bona fide* purchaser for value before maturity and without notice. *Knox v. Williams*, 220.
7. **RECORD OF COURT SHOWING JUDGMENT BY CONFESSION IN OPEN COURT IMPORTS VERITY**, AND CANNOT BE CONTRADICTED BY PAROL EVIDENCE. The record of such judgment is the only proper evidence of itself, and is conclusive of the fact of the rendition of the judgment, and of all the legal consequences resulting therefrom. *Weigley v. Matson*, 335.
8. **FOR THE PURPOSE OF FIXING AMOUNT OF RECOVERY IN ACTION ON BOND GUARANTEEING NEGOTIABLE PAPER** transferred to plaintiff, it is not necessary, as a condition to the introduction of the notes in evidence, to prove their execution, even if it is denied in the answer. *Lombard v. Mayberry*, 234.
9. **RULE AS TO PROOF OF WRITTEN INSTRUMENTS** and records does not include oral testimony of the existence of such instruments or records, preliminary to their introduction or proof of loss. *Village of Ponca v. Crawford*, 144.
10. **CERTIFIED COPY OF DEED**, to be admissible, need not show by scroll or otherwise that the original was under the seal of the corporation making

it, if its recitals are to the effect that it was under the corporate seal. *Colvin v. Republican Valley Land Association and Lincoln Land Co.*, 114.

11. **CHURCH RECORDS.** — FORMER ENGLISH RULE WHICH RECOGNIZED NONE BUT REGISTERS and similar records of churches of the established religion has been abrogated, in England, by statute, so as to open the door to many other records which all churches keep, and which are as likely to be accurate as those of an established church. Such records serve a purpose equivalent to that served by family records, and in this country they are fairly to be dealt with as equivalent to corporation records, which are generally evidence of such matters as are recorded in the usual course of affairs. *Hunt v. Order of Chosen Friends*, 855.
12. **FRAUD CANNOT BE PRESUMED IN RECORDS OF CHURCHES** any more than in any other documents preserved for similar purposes. *Id.*
13. **DOCUMENT CONSISTING OF LEAF TAKEN, AFTER HIS DEATH, FROM SOLDIER'S PRIVATE RECORD-BOOK,** required to be kept by soldiers in the British service, and containing the names of the soldier and his wife, and the names, ages, and places of birth of all his children, is competent to prove relationships and the ages of the children; and its removal from the book in no way derogates from its authenticity, so long as it was traced and explained. *Id.*
14. **IN MICHIGAN, MARKET REPORTS, AND RECORDS OF THE WEATHER** as kept at the asylum at Kalamazoo, are competent evidence in civil cases. *People v. Dow*, 873.
15. **RECORD KEPT BY OFFICER IN CHARGE OF SIGNAL-SERVICE STATION** is not admissible in evidence, on a trial for burglary, to show the condition of the weather on the night in question, without calling as a witness the one who made the observations and the record, to testify to their correctness. *Id.*

See APPEAL, 4.

EXCEPTIONS.

See APPEAL, 10; DEEDS, 2.

EXECUTIONS.

1. **EXECUTION ISSUED BEFORE JUDGMENT IS RECORDED.** — Where judgment is part of proceedings in court in term time, it is not material whether record was actually written up or not at time execution issued. *Weigley v. Matson*, 335.
2. **TRESPASS BY SHERIFF.** — PERSONAL PROPERTY OF TENANT IN COMMON IS EQUALLY EXEMPT from levy and forced sale as like interests in other property, where the possession as well as the title is several; and where such tenant, after notice of the execution, schedules and claims his interest as exempt under the statute, if such interest is thereafter levied upon and sold by the sheriff, the latter is liable in trespass under the Illinois statute in double the value of the property. *Heckle v. Grewe*, 332.
3. **EXECUTION SALE OF REAL ESTATE CURES ALL DEFECTS AND IRREGULARITIES** in the proceedings relating thereto, where the court making the order is one of competent jurisdiction; such order cannot be collaterally attacked. *Wilcox v. Raben*, 207.
4. **ORDER OF CONFIRMATION OF SALE OF REAL ESTATE ON EXECUTION IS VALID, AND ADJUDICATES THE VALIDITY OF SALE,** although such order

does not fully describe the property sold, if the defective description is aided by a correct description contained in the officer's return, to which reference is made by the date of sale. *Id.*

6. **SALE OF LOTS UNDER EXECUTION AGAINST DEFENDANT IS NOT VOID**, because of an irregularity in the notice of sale, reciting that the lots were levied upon and would be sold as the property of the defendant's wife. *Morris v. Hastings*, 570.
6. **WHEN NOTICE OF SALE UNDER EXECUTION HAS NOT BEEN PROPERLY GIVEN**, and objection is made by the defendant in execution without unnecessary delay, the sale may be set aside; but the objection will be considered as waived if not made in a reasonable time. *Id.*
7. **SALE, AVOIDANCE OF. — IN COLLATERAL PROCEEDING**, IT IS NOT ESSENTIAL TO VALIDITY of an execution sale that there should have been an advertisement of the property. But if such irregularity is brought about by the fraud and collusion of the purchaser, and the property sells for a grossly inadequate price, the sale may be avoided as to such vendee and those claiming under him with notice. *Id.*
8. **CONSTRUING TEXAS REVISED STATUTES, ARTICLES 2309 AND 2319, RELATING TO EXECUTION SALES**, it was not the intention of the legislature that sales of property under execution should be declared void on account of mere irregularities in advertising, or because of a failure to advertise such property, but that the injured party should look to the officer for all damages thus occasioned, it being in the interest of the public that execution sales should be sustained. *Id.*
9. **WHERE PROPERTY FRAUDULENTLY CONVEYED IS SOLD UNDER EXECUTION** against the grantor for a grossly inadequate consideration, by reason of irregularities in the proceedings, the fraudulent grantee can, by a proper procedure, have the sale set aside. He has a right subordinate only to the claim of the creditors, and this right is not placed beyond the pale of legal protection because of his participation in a fraud. *Miller v. Koertge*, 587.
10. **EVIDENCE SHOWING THAT ABSTRACT OF JUDGMENT UNDER WHICH PARTY CLAIMS HAD BEEN RECORDED** does not raise a presumption that the abstract was properly noted in the index. The legal inference is, that the claimant would have proved the indexing of the abstract if an index had in fact been made. *Id.*
11. **FRAUDULENT GRANTEE OF LAND CANNOT PROCURE** a sale of it under execution against his grantor to be set aside for gross inadequacy of price, if it appears that the low price bid for the property was caused by the recording of the fraudulent conveyance to the grantee. *Id.*
12. **IN ORDER TO SET ASIDE A SHERIFF'S SALE FOR MERE IRREGULARITY** and inadequacy of consideration, a direct proceeding should be instituted for that purpose in the court from which the execution issued, and the plaintiff in execution, as well as the purchaser, should be made a party. *Id.*
13. **SHERIFF HAVING SOLD PERSONAL PROPERTY ON EXECUTION, IN TERMS**, BUT WITHOUT AUTHORITY, "subject" to a certain mortgage, and the execution creditor having purchased the property in fact upon that condition, he will not be heard, while insisting upon and asserting a title acquired by that sale, to claim that the condition is not binding upon him. *Cable v. Byrne*, 696.
14. **PURCHASER AT PUBLIC SALE IS AFFECTED BY TERMS** or conditions of sale announced at the opening, although he did not come upon the

ground until after the opening. If he would know upon what terms or under what circumstances the sale was being made, he should make inquiry. *Id.*

See JUDICIAL SALE.

EXEMPTION.

See EXECUTIONS, 2; HOMESTEAD, 4.

EXECUTORS AND ADMINISTRATORS.

1. AT COMMON LAW, GENERAL JUDGMENT AGAINST EXECUTOR, who did not plead *plene administravit* or *preter*, is conclusive evidence of assets in a second action of debt suggesting a *devastavit*, the only qualification being that a matter arising subsequent to the former action, showing a destruction of the assets, or removal of them from the hand of the executor without fault, may be set up. *Brenner v. Alexander*, 301.
2. EXECUTOR OR ADMINISTRATOR, WHO, BELIEVING THAT HE HAS ASSETS SUFFICIENT for the payment of all debts, suffers judgment to be entered against him, will be relieved in equity if the assets become insufficient through an unexpected depreciation of their value, for the reason that the defense arises subsequently to the judgment, and without fault on his part; but if he confesses judgment against himself for a debt of his testator or intestate, upon a miscalculation of assets in his hands, and it appears afterwards that the assets are insufficient to satisfy it, he will not be relieved in equity against the judgment. *Id.*
3. ADMINISTRATOR OF ESTATE NOT PERMITTED TO IMPEACH HIS OWN OFFICIAL ACTS. — A party who, as administrator of an estate, procures an order of sale of real estate under which the property is sold, and who inaugurates and consummates all the proceedings in the cause, cannot be permitted, in an action to nullify such sale, to impeach by his testimony his own official acts or the probate proceedings in such cause. *Linman v. Riggins*, 549.
4. ADMINISTRATOR, WHO IS SURVIVING PARTNER IN COMMUNITY OF DECEASED, MAY PURCHASE at the sale of the effects of the deceased whose estate he represents. *Id.*
5. PROBATE SALE OF REAL ESTATE FOR PAYMENT OF DEBTS IS NOT VOID merely because such debts were not actually due. Such matter is a mere irregularity. *Id.*
6. PURCHASER AT PROBATE SALE IS NOT BOUND TO LOOK BEYOND DECREE recognizing its necessity, where such sale is made under the order of the probate court, for the payment of the debts of the deceased. *Id.*
7. FOREIGN EXECUTORS MAY SUE OR BE SUED upon contracts made with them in their capacity of executors, though the rule is otherwise with respect to contracts made by the testator in his lifetime. Such executors may be compelled to specifically perform a contract made by them in this state to sell and assign a judgment recovered by their testator. *Johnson v. Wallis*, 742.

EXTRADITION.

1. HABEAS CORPUS. — EXTRADITION WARRANT IS VALID WHICH RECITES, BUT DOES NOT SET FORTH IN FULL, THE AFFIDAVIT upon which it issued. The correct rule is, that where the executive issuing the warrant withholds the papers on which its issuance is based, then the warrant itself must be relied on for the necessary evidence to show that the essential condi-

tions requisite to a valid issuance exist, and it is sufficient that the recitals therein are what the law requires. *Ex parte Stanley*, 440.

2. **WARRANT IS DULY CERTIFIED** which states that the demand of the governor for the fugitive was "accompanied by a copy of said affidavit, duly certified as authentic," although under a literal compliance with the statute it should have stated that said copy was certified as authentic by the governor demanding the fugitive. Such statement that it was "duly certified as authentic" must be held to mean that it was certified according to law. *Id.*
3. **WARRANT NEED ONLY STATE FACTS WHICH UNMISTAKABLY SHOW THAT DEMANDED PERSON IS A FUGITIVE** from justice from demandant state to another. A direct statement of such fact is not necessary. *Id.*
4. **WARRANT NEED NOT SHOW THAT CRIME CHARGED IS A CRIME BY THE LAW OF THE DEMANDING STATE.** *Id.*
5. **UPON HEARING ON HABEAS CORPUS FOR DEMANDED PERSON**, it is error to admit in evidence a copy of an affidavit, made in the demandant state, charging applicant with obtaining money under false pretenses, where such affidavit was not part of respondent's return, was not attached to and did not accompany the warrant, was not authenticated as evidence, and was not shown or claimed to be the evidence on which warrant issued; but it is not error which will operate to discharge applicant. *Id.*

FIRE INSURANCE.

See **INSURANCE**, 1-9.

FORECLOSURE.

See **MORTGAGES**, 8-11.

FOREIGN EXECUTOR

See **EXECUTORS AND ADMINISTRATORS**, 7.

FORGERY.

1. **ORDER FOR MERCHANDISE MAY BE THE SUBJECT OF FORGERY.** *Hendricks v. State*, 463.
2. **INDICTMENT WHICH SETS OUT INSTRUMENT ALLEGED TO BE FORGED IS VALID AND SUFFICIENT WITHOUT INNUENDO OR EXPLANATORY AVERMENTS** as to words "bare" and "grosses," used therein, where said instrument reads: "Please let Bare Have the sume of \$5 Dollars in Grosses and charge the same to," and is signed; such instrument is neither incomplete, unmeaning, nor unintelligible. *Id.*

FORMER JEOPARDY.

ACCUSED WAIVES RIGHT TO CLAIM FORMER JEOPARDY where he makes a motion which substantially amounts to vacating a former judgment against him, and the court sets aside such judgment, notwithstanding the court, in addition to what is asked, does of its own motion award a new trial. *Sterling and Matlock v. State*, 452.

FRAUDULENT CONVEYANCES.

1. **INSOLVENT CORPORATION.** — Conveyance authorized by the directors of an insolvent corporation of all of its property to secure a debt due from it

to another corporation, at a meeting of directors in which several of the persons participating and voting for the conveyance are directors of the corporation for whose benefit the conveyance is executed, is *prima facie* fraudulent and void, as to the grantor and its stockholders and creditors. The burden is upon the grantor to remove the presumption of fraud by convincing proof of the fairness of the transaction, and its absolute freedom from fraud. *Sweeney v. Grape Sugar Co.*, 88.

2. **INSOLVENT CORPORATION.** — Creditors of an insolvent corporation have the right to avoid a transfer of the corporate property made by its directors in violation of their trust and duties, or for the benefit of themselves, either directly or indirectly, where the rights of no innocent third party have intervened, and there has been no unreasonable delay on the part of such creditors. *Id.*
3. **INSOLVENT CORPORATION — LIEN OF CREDITORS.** — Assets of an insolvent corporation are not a trust fund, and creditors may secure preferences therein by obtaining liens by judgment, or otherwise. *Id.*
4. **A FRAUDULENT GRANTEE IS SUBSTITUTED TO THE RIGHTS** of his grantor in the property conveyed, which is subject only to the latter's creditors, and it is the right of the fraudulent grantee to demand that such creditors shall pursue strictly the procedure provided by law for the enforcement of their claims. *Miller v. Koertge*, 587.

GARNISHMENT.

See ATTACHMENT.

GAS COMPANIES.

See MUNICIPAL CORPORATIONS, 8-10.

GIFTS.

See DEBTOR AND CREDITOR.

GUARANTY.

- IN ACTION ON GUARANTY CONTRACT** for the payment of certain notes, it was pleaded in defense that such contract, by its terms, did not apply to such notes, and also that defendants were discharged by want of diligence in the collection of the notes, which was shown by the evidence, and the court held that, though the verdict in favor of defendants might not be sustained by the evidence as to the construction of the guaranty contract, it could be sustained as to the discharge through negligence, and would not therefore be set aside. *Coquillard v. Hovey*, 131.

See DAMAGES, 1.

GUARDIAN AND WARD.

1. **WHERE GUARDIAN OF INFANT DIES WITHOUT HAVING RENDERED ANY ACCOUNT** of his guardianship, the probate court which appointed him may require the personal representative of the deceased to account for the moneys of the ward received by the guardian in his lifetime. *Peel v. McCarthy*, 681.
2. **GUARDIAN IS PERSONALLY BOUND BY PROMISE MADE ON SUFFICIENT CONSIDERATION TO PAY DEBT OF HIS WARD**, although he expressly promises as guardian, and this principle applies to covenants in lease of

ward's property to purchase at end of term improvements made by tenant, but a debt so paid may be recovered back from estate of ward. *Nichols v. Sargent*, 378.

2. **APPROVAL OF PROBATE COURT OF AWARD BY APPRAISERS OF VALUE OF IMPROVEMENTS** by lessee of ward's property is not required, where lease by guardian, made with approval of probate court, contains provisions relative to mode of appraisal. *Id.*

HABEAS CORPUS.

1. **CANNOT REACH ERRORS** or irregularities which render proceedings voidable merely, but only such defects in substance as renders the process or judgment absolutely void. *Barton v. Saunders*, 261.
2. **PERSON ARRESTED IN CIVIL ACTION WILL NOT BE DISCHARGED ON HABEAS CORPUS**, on the ground that the affidavit of arrest only states in the statutory language that the "defendant has been guilty of a fraud in contracting the debt" sued on, etc., without alleging the facts constituting the fraud, such defect being an irregularity or error rendering the process voidable only, and not absolutely void. *Id.*
3. **IT IS UNANSWERABLE RETURN TO WRIT OF HABEAS CORPUS** that the court had jurisdiction in which the action was pending, and any out of which the writ of arrest was issued, and was competent to correct error or abuse of its powers, or to set it aside if erroneously issued. *Id.*

See EXTRADITION, 1, 5.

HIGHWAYS.

1. **IN ACTION FOR INJURY FROM DEFECTIVE HIGHWAY, IF THE FACTS DISCLOSED** by the record do not show clearly and indisputably that the plaintiff was guilty of contributory negligence, and upon this issue there are two reasonable but different views which might be taken, the question should be submitted to the jury. *Harris v. Township of Clinton*, 842.
2. **TESTIMONY TENDING TO SHOW CONDITION AND SITUATION OF HIGHWAY**, and whether there were any railings or guides to indicate the position of the highway embankment when covered by water, and to protect persons from the danger of driving off, is admissible, as bearing upon the defendant's negligence in not keeping the highway in a condition reasonably safe and fit for public travel. *Id.*
3. **IN SUIT INVOLVING NEGLIGENCE OF TOWNSHIP IN NOT KEEPING HIGHWAY IN REPAIR, JURY ARE** the proper persons to draw all proper inferences from the facts proved, and to determine whether the road was reasonably safe or not, and for this purpose expert testimony is not required. *Id.*
4. **MICHIGAN STATUTE DOES NOT REQUIRE TOWNSHIP to keep its highways absolutely safe for public travel, but only reasonably safe for that purpose.** *Id.*
5. **PERSON LAWFULLY USING HIGHWAY, ALTHOUGH HE MEETS WITH OBSTRUCTION** or other cause of insufficiency, may yet proceed if it is consistent with reasonable care so to do, and this is generally a question for the jury. *Id.*
6. **IF DANGER IS KNOWN, AND CAN BE EASILY AVOIDED, peril voluntarily and unnecessarily assumed may constitute such contributory negligence as would preclude recovery.** *Id.*

HOMESTEAD.

1. **CONSTITUTIONAL LAW — LEGISLATIVE POWER.** — The people, in their constitution, so far as future debts may be affected, have the right to provide for any sort of homestead, guarded as they please; subject to restrictions, or without restrictions; to prohibit the owner of the homestead from encumbering it, or permit it to be done, as, in their wisdom, they see fit. And, if unrestricted by the constitution, the legislature may exercise the same power. *Moran v. Clark*, 66.
 2. **RIGHT TO ENCUMBER.** — In the absence of a constitutional or statutory prohibition, as incident to the right of ownership, the owner of the homestead may sell or encumber it, with like effect as if the property had not been set apart as a homestead. *Id.*
 3. **POWER TO ENCUMBER.** — If the statute points out any particular mode by which the owner of the homestead may sell or encumber it, to that extent his power over it is restricted; that particular mode must be adopted, otherwise the sale or encumbrance is invalid. *Id.*
 4. **EXEMPTIONS, WAIVER OF, AS TO PERSONAL PROPERTY.** — When the constitution or statute is silent, a waiver of a debtor's right to claim personal property as exempt from execution, where attempted to be made by an executory contract, as a clause in a note or contract, "waiving the benefit of all exemption laws," is ineffectual, and will not be enforced. *Id.*
 5. **FORCED SALE, WHAT IS NOT A.** — Sale of homestead under a deed of trust, or under a decree of foreclosure of a mortgage thereon, is not a "forced sale," within the meaning of the West Virginia constitution, which exempts a homestead from "forced sale." *Id.*
 6. **CONVEYANCE OF BY TRUST DEED.** — Under the West Virginia constitution, and acts of 1872-73, chapter 193, the owner of a homestead set apart under the provisions of that act may execute a valid deed of trust thereon. *Id.*
 7. **OBJECT OF MICHIGAN CONSTITUTIONAL PROVISION FOR HOMESTEAD** is to protect that dwelling which has been the actual home of the family from such disturbance as will make them lose its enjoyment. It is confined, by its language, to the property actually occupied as a homestead by a resident of the state, and if the owner has a family, it is the actual home of that family which is protected against creditors. *Stanton v. Hitchcock*, 821.
 8. **THERE IS NOTHING IN MICHIGAN HOMESTEAD ACT WHICH CONTEMPLATES** that a wife who has never lived on the premises, or claimed to live there, may, after her husband's death, claim such an interest by relation as will avoid his dealings with property which he never meant should be the home of the absentee, however much he may have wronged her. The provisions of the act are confined expressly to resident widows. *Id.*
 9. **WHERE WIFE HAS ONCE HAD HER HOME WITH HER HUSBAND** in his dwelling, he cannot deprive her of that vested right by driving her out. *Id.*
 10. **CHARACTER OF ANY PROPERTY AS HOMESTEAD DEPENDS ON INTENTION**, and it may be entirely destroyed by a removal of residence, after which the property stands liable to sale or other disposal by the owner at his pleasure. *Id.*
- CONVEYANCE OF BY HUSBAND WITHOUT SIGNATURE OF NON-RESIDENT WIFE.** — A married man went to Michigan, leaving behind

him, in New York, his wife and two minor children, she expecting to join him in the new home, but never did. He bought a lot and built a house thereon, and about two years after his arrival remarried, without a divorce from his first wife. The second wife married him in good faith, supposing him to be single, and lived with him as his wife on said premises till his death, prior to which he conveyed the property to her. None of the first family ever lived in Michigan, except that a son, aged then about eighteen, came and was received as a member of his father's new household, until dismissed for ill-treating the children of the second wife; and the husband never made or proposed to make the property a home for the common occupancy of himself and first wife, but it was intended for and actually occupied by the second wife and family, and so continued till the husband's death. Under this state of facts, the land never became the homestead of the first wife, and the husband's deed to the second wife was not void for want of her signature' *Id.*

12. BOND FOR TITLE EXECUTED BY HUSBAND AND WIFE TO CONVEY THEIR HOMESTEAD can be enforced against the husband by a bill for specific performance, if at any time before the bond should become barred, such homestead was abandoned and a new homestead was acquired. Or if the facts are such as would prevent the enforcement of a specific performance, a suit for damages will lie against the husband for breach of the condition of the bond, if damage has been sustained. *Goff v. Jones*, 619.
13. PROVISION OF TEXAS CONSTITUTION, ARTICLE 16, SECTION 50, under which mortgages, liens, deeds of trust, and deeds involving a condition of defeasance on the homestead are void, has no application to a contract to convey at a future time, and after the property has lost its homestead character. *Id.*
14. WIFE WHO IS INDUCED BY FRAUDULENT CONDUCT on the part of her husband to sign a deed conveying their homestead is entitled, in a court of equity, to have such deed set aside, and to be restored to her rights. *Spiegel v. Spiegel*, 826.
15. CITY LOT PURCHASED WITH INTENTION OF MAKING IT HOMESTEAD for the purchaser and his family will be exempt from levy and sale on execution from the time of purchase, even though unimproved and without a dwelling thereon, if the purchaser incloses it and uses and occupies it with the constant purpose of making it his home, and uses the proceeds thereof, and such means as he can procure, within a reasonable time, to erect a house thereon for his family, provided it does not exceed in quantity and value the constitutional limit. What will be regarded as a reasonable time must necessarily depend upon the circumstances of the particular case. *Dewille v. Widoe*, 852.

HOMICIDE.

1. ONE WHO IN ATTEMPT TO KILL ONE PERSON BY MISTAKE KILLS ANOTHER IS GUILTY OF MURDER OR MANSLAUGHTER; but where two parties assault a third, who in the attempt to shoot them kills another by mistake, the assaulting parties are not guilty of or responsible for such killing, where there was nothing in the character of the assault which would justify a prudent man in resorting to a revolver, and there was no concert of action, and no common design or purpose between them and the assaulted party. *Butler v. People*, 423.

2. **IT IS QUESTIONABLE WHETHER THE CORPUS DELICTI IS SUFFICIENTLY ESTABLISHED** where the whole testimony of the cause of death is that given by a companion of the deceased, who testifies: "I knew Louis McDougald; he is dead; Mr. High shot him; I suppose that was the cause of his death,"—no excuse being shown why other evidence on the point was not produced. *High v. State*, 488.
3. **MURDER. — EVIDENCE IS ADMISSIBLE TO SHOW MOTIVE, HOSTILITY, INTEREST, OR BIAS OF WITNESS TOWARD ACCUSED**, as that witness had had some difficulty with the accused the night preceding the shooting, and had followed accused, threatening to see him again and shoot him. *Bonnard v. State*, 431.
4. **MURDER — EXPLANATORY STATEMENTS OF ACCUSED AS EVIDENCE. —** Where prosecution proves by certain witnesses the statements accused had made to them, the defense is entitled to prove what statements he had made to another, in order to explain the statements made to the witnesses for the prosecution, under the statutory rule that "when a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence": Texas Code Crim. Proc., art. 751. *Id.*
5. **ACCUSED IS GUILTY OF MURDER** if the killing is consequent upon a difficulty between him and the deceased, no matter which provoked it, and there had been an enmity between the parties for some months, and accused had made serious threats against the deceased, which had been communicated to him, and he was anticipating trouble with accused when he should meet him, and was prepared therefor, and under these circumstances both parties had determined to bring on a difficulty when they should meet, in which the one intended to kill the other, or inflict serious bodily injury, which might result in death. *Id.*
6. **KILLING IS MANSLAUGHTER ONLY** if accused did not intend to provoke a difficulty with deceased, but sought an interview with him solely to obtain payment of a claim, and a difficulty ensued, in which accused, on account of abuse heaped upon him by deceased, voluntarily slew him in heat of passion engendered by the present abuse, taken in connection with the previous wrongs done him by deceased, and the circumstances, all combined, were of such a character as to produce cause adequate to render the mind incapable of cool reflection. *Id.*
7. **INSTRUCTION. — KILLING IS MANSLAUGHTER ONLY** if accused sought interview with deceased with no hostile intentions, and deceased became enraged, and committed an assault upon defendant, which inflicted pain or bloodshed, and under the passion thus engendered accused shot and killed deceased; and an instruction is radically defective which does not present this phase of the law in affirmative terms. *Id.*
8. **KILLING IS JUSTIFIABLE ON GROUND OF NECESSARY SELF-DEFENSE** if accused sought an interview with deceased with no hostile intentions, but solely to demand settlement and payment of a claim, and deceased became angry and a wordy altercation ensued, during which deceased drew his pistol, and assaulted accused in such a manner as to create in the latter's mind a reasonable apprehension of death or serious bodily injury, and, acting upon such reasonable apprehension, accused fired the fatal shot. *Id.*
9. **TWO OF THE "ADEQUATE" CAUSES SUFFICIENT TO REDUCE A HOMICIDE FROM MURDER TO MANSLAUGHTER** are: "1. An assault and battery by

the deceased causing pain and bloodshed; and 2. A serious personal conflict, in which great injury is inflicted by the person killed, by means of weapons or other instruments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide were the aggressor, provided such aggression was not made with intent to bring on a conflict for the purpose of killing": Texas Penal Code, arts. 593, 597. And it is expressly declared that "an assault and battery so slight as to show no intention to inflict pain or injury" is not adequate cause: *Id.*, sec. 596. *High v. State*, 488.

10. HOMICIDE IS PERMITTED BY LAW IN NECESSARY SELF-DEFENSE for the purpose of preventing murder, or maiming, or serious bodily injury, and the only qualification prescribed is "that the attack upon the person of an individual in order to justify homicide must be such as produces a reasonable expectation or fear of death or some serious bodily injury": Texas Penal Code, art. 574. A defendant so attacked is neither bound to retreat nor to resort to any other means before slaying his assailant. *Id.*
11. SELF-DEFENSE WHERE THE ATTACK AND INJURY ARE BY THE FISTS OF THE DECEASED, WITH INTENTION OF INFLECTING A BEATING upon defendant, and if defendant had already received serious bodily injury at the hands of deceased, and it reasonably appeared to him from the acts and conduct of deceased that the combat was not over, and that he was about to receive additional bodily injury from deceased, that deceased had the ability to inflict the injury, that the danger was threatening and imminent, and under such circumstances and so believing he shot and killed deceased, then he would be justifiable upon the ground of his necessary self-defense. *Id.*
12. KILLING IN SELF-DEFENSE. — WHERE ACCUSED HAS BEEN THREATENED BY DECEASED WITH DEATH OR SERIOUS BODILY INJURY, and such threat has, prior to the homicide, been communicated to the accused, and at the time of the homicide the deceased by any act manifests an intention to execute such threat, the killing is justifiable homicide. *Alexander v. State*, 438.
13. INSTRUCTIONS. — WHERE ACCUSED RELIES UPON THE LAW OF SELF-DEFENSE, evidence as to threats and character of deceased, and his conduct at the time of the homicide, should be affirmatively submitted to the jury, to be considered by them in determining whether or not "adequate cause" for the homicide existed. *Id.*
14. INSTRUCTIONS — INTENT TO KILL. — Where jury were instructed what the law was in case the evidence showed that the accused provoked the contest with the deceased, with intent to kill him, they should also, where the evidence warrants it, be instructed as to what the law is when a difficulty is provoked with no intention to kill. *Id.*
15. HOMICIDE COMMITTED IN PREVENTING ARREST IS JUSTIFIABLE, even if the attempted arrest is lawful, where power to arrest is exercised in such a wanton and menacing manner as to threaten accused with loss of life or some bodily harm. *Jones v. State*, 454.
16. KILLING IN RESISTING AN ILLEGAL ARREST of ordinary character is manslaughter. *Id.*
17. ON TRIAL FOR MURDER, INSTRUCTIONS SHOULD DISTINCTLY SET FORTH THE LAW applicable to the case, not alone the case as made by the evidence for the prosecution, but the case as made by all the evidence, and especially the law applicable to any favorable evidence comprising defensive matter in behalf of the accused. *Meuly v. State*, 477.

18. **SELF-DEFENSE.** — Under the law of Texas, a party has a right to defend himself against any assault, or threatened assault, made upon his person, calculated to inflict death or serious bodily injury; and it is not essential to his perfect right of self-defense that the danger be real or in fact exist; it may only be apparent. If it reasonably appears from the circumstances of the case that danger existed, the person threatened with such apparent danger has the same right to defend against it, and to the same extent, that he would have were the danger real. But if a party, by his own wrongful act, brings about the necessity of taking the life of another to prevent being himself killed, he cannot say that such killing was in his necessary self-defense, but it will be imputed to malice, express or implied, by reason of the wrongful act which brought it about, or malice from which it was done. *Id.*
19. **MURDER.** — **THE RULE AS TO SELF-DEFENSE IS LIMITED BY THE INTENTION** of a party who brings about the necessity of taking the life of another. If the intention was not felonious, the homicide which necessity compelled will not be murder. *Id.*
20. **SELF-DEFENSE.** — **WHERE THERE ARE MORE ASSAILANTS THAN ONE,** the slayer has the right to act upon the hostile demonstrations of either one of them, and to kill either of them if it reasonably appear to him that they were present, acting together to take his life or do him serious bodily injury. *Id.*
21. **RIGHT OF SELF-DEFENSE** exists, notwithstanding a mere preparation to commit the wrongful act, where there is no accompanying demonstration which indicates the wrongful purpose. *Id.*
22. **MANSLAUGHTER.** — **A PERSON ILLEGALLY RESTRAINED OF HIS LIBERTY** may not only oppose force to force, but can increase that force to killing of his adversary, if necessary to prevent the attempted wrong, and such killing is reduced to manslaughter. *Id.*
23. **MANSLAUGHTER.** — **WHERE ONE, UNDER THE INFLUENCE OF SUDDEN PASSION, KILLS ANOTHER,** not having provoked the contest with intent to kill, but, under the influence of terror produced by the acts of his adversary, procures a pistol as a means of defense in case of an attack, or in case of an attempted enforcement of a threat to illegally restrain him of his liberty, and the acts, words, and conduct of his adversary are such as to arouse anger, rage, sudden resentment, or terror, rendering his mind incapable of cool reflection, and under the immediate influence of the sudden passion the killing is done, this is not murder, but manslaughter: Texas Penal Code, arts. 593, 594. *Id.*
24. **QUESTION WHETHER ACT OF KILLING WAS CAUSED BY PASSION IS FOR THE JURY,** and not for the court, to pass upon, where the evidence tends to show that passion was aroused by an adequate cause. *Id.*

HUSBAND AND WIFE.

1. **COMMUNITY PROPERTY.** — **IT IS SETTLED LAW IN TEXAS THAT ALL PROPERTY ACQUIRED** during marriage is presumed to belong to the community, whether the conveyance is to the husband or wife, or both, and the burden of proving that it is the separate property of either is on the party asserting it. And in order to show that property purchased during the marriage is the separate property of one of the spouses, the fund with which it was acquired must be clearly shown to have been the separate property of such person, and this will not be inferred

except from circumstances of a conclusive tendency, if at all. *Morris v. Hastings*, 570.

2. RECONVEYANCE TO HUSBAND OF LAND DEEDED TO WIFE WILL BE ORDERED, WHERE SHE ABANDONS HIM WITHOUT CAUSE, and such land was conveyed to her at her solicitation by reason of his confidence in her as his wife, to relieve her anxiety, and to provide her with a means of support in case of his death. *Dickerson v. Dickerson*, 213.
3. WIFE WILL BE BOUND WHERE SHE EXECUTES DEED OF REAL ESTATE IN BLANK as to grantee, date, or amount of consideration, and delivers it to her husband under circumstances which imply authority in him or such person as he may authorize to fill out said blanks; especially so, where she afterwards, with full knowledge of the fact, receives and uses the money arising from a sale of the land to a *bona fide* grantee. *Reed v. Morton*, 247.
4. HUSBAND CANNOT TESTIFY WHERE HIS WIFE HAS INTEREST involved in the litigation. *Johnson & Co. v. Boice*, *Frellsen v. Witkowski*, 528.

INDICTMENT.

1. PRINCIPALS IN CRIME. — PERSON NOT PRESENT AT THE COMMISSION OF A CRIME, BUT WHO COUNSELED, INDUCED, AND PROCURED it to be committed, may, under the provisions of section 294 of the Penal Code of New York, be convicted under an indictment charging him with the commission of such crime. *People v. Bliven*, 701.
2. ACCESSARIES BEFORE THE FACT, IN CASES OF TREASON AND OF MISDEMEANOR, ARE PRINCIPALS, by the rules of the common law. *Id.*
3. ACCESSARIES BEFORE THE FACT IN THE COMMISSION OF A FELONY MAY BE INDICTED AND CONVICTED AS PRINCIPALS, under section 29 of the Penal Code of New York. That section reads as follows: "A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces, or procures another to commit a crime, is a principal." *Id.*
4. IN INDICTMENT FOR FELONY, ONE CHARGED AS PRINCIPAL CANNOT BE CONVICTED AS AN ACCOMPLICE. *Phillips v. State*, 471.
5. IDEM SONANS. — IN CHARGING INTENT IN INDICTMENT FOR THEFT, THE USE OF "APPRIATE" FOR "APPROPRIATE" IS FATALY DEFECTIVE, where intent to appropriate is an essential and material element of the offense under the statute. *Jones v. State*, 449.

INSTRUCTIONS.

1. COURT CANNOT PROPERLY SUBMIT TO JURY facts on which the testimony is all one way. *Hunt v. Order of Chosen Friends*, 855.
2. INSTRUCTIONS WHICH PRESENT MATTERS OF FACT, SUPPORTED TO SOME EXTENT AT LEAST BY THE EVIDENCE, should be given, and it is error to refuse them; the court may not ignore matters of fact submitted by a defendant, by refusing to submit to the jury the law applicable thereto. *Phillips v. State*, 471.
3. STATE MAY BE REQUIRED TO ELECT UPON WHICH COUNT OF AN INDICTMENT IT WILL CLAIM CONVICTION, ONLY WHEN distinct felonies not of the same character are charged in different counts in the same indictment. But where there are two counts, and the state itself elects upon which

to proceed, and the court sanctions such election, that count alone should be submitted to the jury, who should be instructed that they could not consider and could not convict on the other count. *Baker v. State*, 427.

4. **SELF-DEFENSE.** — If a party's right to self-defense depends upon the intent with which he provoked the difficulty, and the intent is a fact to be found by the jury, then the charge of the court, in cases where the evidence creates any doubt as to the character of the intent, should always instruct the jury as to the distinction between perfect and imperfect self-defense, as applicable to the particular act of accused, and his liability. *Meuly v. State*, 477.
5. **SELF-DEFENSE.** — **WHERE DECEASED, ATTEMPTING ILLEGAL ARREST,** made an unlawful attack upon accused, reasonably calculated to create in a man of ordinary mind a belief that deceased was about to inflict on him death or serious bodily injury, the right of accused to kill in such case is complete, whether he was or was not the person named in a warrant which deceased had illegally attempted to serve, and a charge to the *contra* is erroneous. *Jones v. State*, 454.
6. **HOMICIDE TO PREVENT UNLAWFUL ARREST IS JUSTIFIABLE** if accused at the time believed, and had reasonable cause to believe, that he was being unlawfully arrested, that his life was in serious danger, and that the killing was necessary to prevent his unlawful arrest; and it is error to refuse instruction to that effect. *Id.*
7. **VARIANCE.** — **EVIDENCE IS SUFFICIENT TO SUSTAIN ALLEGATION IN INDICTMENT FOR ASSAULT WITH INTENT TO COMMIT MURDER,** where indictment is not required to set forth the means and weapon used, and the assault is alleged to have been committed "with a gun," but the testimony shows that the weapon used was "a pistol"; and an instruction, in substance that conviction might be had if assault as charged was committed with a gun or pistol, is correct. *Douglas v. State*, 459.
8. **INSTRUCTIONS NOT APPLICABLE TO FACTS MAY BE REFUSED.** *Chicago etc. R'y Co. v. West*, 380.
9. **CHARGE OF COURT TO JURY** in the particular case held to be improper, on the ground that it was argumentative. *Hays v. Gainesville Street R'y Co.*, 624.

See DAMAGES, 8; HOMICIDE, 13, 14.

INSURANCE.

1. **LANGUAGE OF CONDITION IN POLICY OF INSURANCE MUST BE CLEAR** and unambiguous, and any reasonable doubt as to its meaning must be resolved in favor of the insured. The terms employed must be construed with reference to the nature of the property insured, the purposes for which it is ordinarily used, and the manner in which it is usually kept, so as to give the conditions, if possible, a meaning reasonably applicable to the kind of insurance upon that particular species of property. *De Graff v. Queen Ins. Co.*, 685.
2. **CONSTRUCTION OF INSURANCE POLICY WITH REFERENCE TO SITUATION OF PROPERTY INSURED.** — A statement in a policy of insurance against fire and lightning, describing live-stock covered by the policy as being in a certain barn, taken in connection with a clause in the policy providing that the company "shall not be liable for more than the sum or sums insured, nor the interest of the insured, except as hereinafter provided, as specified upon the property described in the places herein set forth,

and not elsewhere," is to be construed as mere matter of description for identification of the property insured, and not a promissory stipulation on the part of the insured, or a condition of insurance on the part of the insurer, that such location of the property should remain unchanged. *Id.*

3. **ORAL ASSENT BY AGENT OF AN INSURANCE COMPANY TO THE EFFECTING OF ADDITIONAL INSURANCE** will not relieve the insured from the forfeiture of his policy, when it provides that such agent has no authority to waive, modify, or strike from the policy any of its printed conditions, nor in case the policy shall become void, to revive the same, and that if the assured shall procure any other or further insurance without the consent of the company written upon the policy, the policy shall become void. The assured must be presumed to have knowledge of the restrictions contained in the policy. *Cleaver v. Traders' Ins. Co.*, 908.
4. **INSURANCE COMPANY HAS POWER TO RESTRICT THE POWERS AND DUTIES OF ITS AGENTS** as it may choose; and when their authority is expressly limited and restricted by the policy which the insured receives, such restrictions and limitations must be regarded as binding upon him. *Id.*
5. **FACT THAT THE ASSURED MAY NOT HAVE READ THE PRINTED CONDITIONS OF HIS POLICY**, and, in ignorance of them, relied upon the implied or assumed powers of an insurance agent, cannot help him. It is the business of the assured to know what his contract of insurance was, and there can be no difference in this respect between an insurance policy and any other contract. *Id.*
6. **WHEN INSURANCE POLICY CONTAINS LIMITATIONS UPON THE POWER OF THE AGENT**, he has no legal right to contract as agent of the company with the assured so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, and the holder of the policy is estopped by its acceptance from relying upon any powers in the agent in opposition to the limitations and restrictions contained in the policy. *Id.*
7. **FRAUD AS BAR TO RECOVERY FOR LOSS UNDER POLICY.** — The assignee of a policy of insurance containing a provision "that all fraud or attempt at fraud, by false swearing or otherwise, shall be a complete bar to any recovery for loss under it," cannot enforce a recovery, although the assignment was made with the consent of the insurance company, if the transfer proved to be fraudulent as to creditors, of which the company was ignorant when it consented to the transfer; and this is so, although the assignee was the local agent of the company. *Phoenix Ins. Co. v. Willis*, 566.
8. **INSURANCE COMPANY MAY INSIST UPON THE INVALIDITY** of its policy, for breach of conditions therein, and thus avoid liability for a loss, without returning or offering to return any portion of the premiums paid. *Id.*
9. **CREDITORS OF INSURED CANNOT COMPEL PAYMENT OF THE POLICY** by process of garnishment against the insurance company, if the insured himself has forfeited the right to enforce collection by violating conditions contained in the policy. *Id.*
10. **LIFE INSURANCE POLICY MAY BE AVOIDED FOR FALSE ANSWERS WRITTEN BY THE AGENT OF THE INSURANCE COMPANY**, after leaving the presence of the assured, in an application signed in blank, if the answers so written conform to those actually made by the applicant. *Brown v. Metropolitan Life Ins. Co.*, 894.

11. IF ANSWERS ARE WRITTEN IN APPLICATION FOR INSURANCE BY AGENT OF THE INSURER WITHOUT THE KNOWLEDGE or consent of the applicant, the company is precluded from any defense based on the falsity of such answers. *Id.*
12. ANSWERS OF APPLICANT FOR INSURANCE OUGHT TO BE CONSTRUED LIBERALLY in his favor. *Id.*
13. QUESTION TO APPLICANT REGARDING "ATTENDANCE BY PHYSICIAN" should be construed as meaning attendance upon the applicant for some disease or ailment of importance, and not for an indisposition trivial in its nature, and such as all persons are liable to who are yet considered to be in sound health generally. *Id.*
14. FALSE ANSWERS TO QUESTIONS REGARDING HEALTH OF APPLICANT will avoid policy of insurance, though in a prior application to the same insurer for other insurance, different and correct answers were made to the same question. The insurer is not bound to take notice of the answers given in the prior application. *Id.*
15. THE TERM "SOUND HEALTH," WHEN USED IN QUESTIONS IN APPLICATIONS for life insurance, means a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, not a mere temporary indisposition which does not tend to weaken or undermine the constitution of the assured. *Id.*
16. EVIDENCE. — CONVERSATION OF PHYSICIAN WITH MOTHER OF THE ASSURED is not competent evidence for the purpose of showing the latter's state of health. *Id.*
17. EVIDENCE. — PHOTOGRAPH OF ASSURED IS NOT COMPETENT EVIDENCE for the purpose of showing his healthy appearance. *Id.*
18. EVIDENCE. — PHYSICIAN IS NOT PRECLUDED FROM ANSWERING the question as to whether or not he had ever treated the assured for a specified disease, such as typhoid fever. *Id.*
19. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT ANSWERS WRITTEN BY AN INSURANCE AGENT in an application which had been first signed in blank were incorrectly written by the agent, and were not the true answers made by the assured. *Id.*
20. EVIDENCE. — TESTIMONY OF A PHYSICIAN IN RELATION TO WHAT AN APPLICANT FOR INSURANCE SAID ABOUT HAVING A PARTICULAR DISEASE, and the physician's conclusion from such examination, and his statement in his written report thereof, are admissible as tending to prove that the applicant was free from the disease in question. *Id.*
21. POLICY DECLARING THAT IF THE INSURED SHALL DIE BY HIS OWN HAND, sane or insane, it shall become null and void, is avoided if he commits suicide while insane, unless his insanity was such that he did not know that his act was done for the purpose of self-destruction. It matters not that he had no conception of the wrong involved in its commission. *Streeter v. Western Insurance Company*, 882.
22. SUICIDE CANNOT BE REGARDED AS DEATH BY ACCIDENT or from accidental causes, from the fact that it was committed while the assured was insane, and the insanity was produced or accelerated by an accidental fall or injury. Whether the injury received by the fall was the cause of the suicide was too conjectural to be submitted to the jury as a direct cause of self-destruction. *Id.*
23. ACCIDENT INSURANCE — DEATH, WHEN NOT THE RESULT OF DESIGN. — Accident insurance policy contained a condition exonerating the insurer from liability, if the death of the assured was the result of design on the

part of the assured or any other person. The assured was shot by an officer; but there was some evidence tending to show that the officer did not know it was the assured at whom he shot, and that he did not intend to kill the assured. *Held*, that if this evidence were true, it could not be said as a matter of law that the assured lost his life from the design of another. *Utter v. Travelers' Insurance Company*, 913.

24. DEATH DOES NOT RESULT FROM THE UNLAWFUL ACT OF THE ASSURED, if he was a deserter and was killed by an officer, who was instructed to arrest him as such deserter, if he was not doing any unlawful act at the time he was killed. *Id.*
25. VOID CONDITION. — CLAUSE IN A POLICY OF INSURANCE REQUIRING DIRECT OR POSITIVE PROOF that the death of the assured was caused by external violence and accidental means, and was not the result of design, either on the part of the assured or any other person, cannot be allowed to prevail as a rule of evidence on the trial of an action against the insurer. Courts will not permit the course of justice upon a trial before them to be stipulated or contracted in such manner as to defeat the ends to be subserved by such trial. *Id.*
26. IF STIPULATION OR EXCEPTION IN A POLICY OF INSURANCE IS CAPABLE OF TWO MEANINGS, that must be adopted which is most favorable to the assured. *Id.*
27. POLICY, CONSTRUCTION OF. — A policy was issued by which the person insured was indemnified from loss by accident, in a certain sum per week, "against loss of time not exceeding twenty-six consecutive weeks from the happening of such accident and injury as shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business by reason of bodily injuries, . . . through external, violent, and accidental means; or in the event of death, occasioned by bodily injuries received as aforesaid, when resulting within ninety days from the happening thereof, and in such event only will pay the sum of —; provided, always, that this insurance shall not extend to any bodily injury of which there shall be no external and visible sign upon the body of the insured, nor to any death or disability which may have been caused by hernia, bodily infirmities, nor by the taking of poison, contact with poisonous substances, or inhaling of gas, or by any surgical operation or medical treatment; nor to any cause except where the injury is the approximate and sole cause of the disability or death." The assured was found dead in his room, and it was evident that his death had been caused by breathing illuminating gas, and there were no external or visible signs of injury upon his body. The judge, however, found as a fact that the death was occasioned by accidental means. It was held that this death was one against which the decedent was insured by the terms of the policy above set forth; and that the proviso in the policy, by which the insurer exempted himself from liability for any bodily injury of which there should be no external and visible sign upon the body, clearly had reference only to the weekly claim for indemnity, and not to an injury resulting in the death of the assured. *Paul v. Travelers' Insurance Company*, 758.
28. AN ACCIDENT IS THE HAPPENING OF AN EVENT without the aid or the design of the person injured, and which is unforeseen. *Id.*
29. POLICIES OF INSURANCE, CONSTRUCTION OF. — Policies of insurance are to be liberally interpreted, and conditions therein must be construed strictly

against those for whose benefit they are reserved. In their construction, their words should be taken in that sense to which the apparent object and intention of the parties limit them, and which is to be gathered from the surrounding clauses, and from all parts of the instrument. *Id.*

30. **INSURANCE POLICIES. — DEATH BY EXTERNAL AND VIOLENT MEANS,** within the meaning of an insurance policy, may be occasioned by the breathing of illuminating gas. That gas in the atmosphere as an external cause is a violent agency in the sense that it may work upon the assured so as to cause his death, and his death from such cause must therefore be regarded as an accident proceeding from an external and violent agency. *Id.*
31. **WAIVER. —** Though a policy of insurance specifies that it shall be void if the property insured is situate on leased ground, "unless specially agreed to in writing in or upon the policy," the company cannot avoid the policy for a breach of that condition if its agent was aware that the property was on leased ground, and made out the application himself. *Germania Fire Ins. Co. v. Hick*, 384.
32. **ESTOPPEL. — INSURANCE COMPANY WHICH KNOWINGLY TAKES A PREMIUM FOR A POLICY UNDER CONDITIONS WHICH RENDER IT INVALID** is estopped from urging those conditions to release it from its contract. *Id.*
33. **IF APPLICATION FOR INSURANCE IS MADE OUT BY AN AGENT OF THE INSURER, ACTING ON HIS OWN KNOWLEDGE,** the company ratifies his acts by granting the policy. If he was mistaken in the representations which he makes in the application, the company cannot insist upon it as a defense to a recovery. *Id.*
34. **COURT IS NOT BOUND TO HOLD AS LAW ALL LEGAL PROPOSITIONS SUBMITTED TO IT ON TRIAL OF CASE WITHOUT JURY.** It is sufficient if propositions submitted and held correct state every possible principle of law necessary to be considered in the case. *Id.*

INTEREST.

1. **INTEREST UPON INTEREST,** decisions respecting the allowance of, cited by the court. *Mathews v. Toogood*, 131.
2. **INTEREST UPON A COUPON, OR INTEREST NOTE,** is forbidden by the statute of Nebraska, in all cases where the allowance of such interest, though expressly agreed to be paid, would result in the payee's receiving a greater sum than ten per cent per annum on the amount of his loan. *Id.*

JUDGMENT.

1. **NO PERSON CAN BE EFFECTED BY A JUDICIAL DECREE UNLESS A PARTY THERETO,** either individually or by representation. *Landon v. Torenshend*, 712.
2. **JUDGMENT RENDERED BY COURT OF GENERAL JURISDICTION WILL BE PRESUMED** to have been authoritatively entered by the clerk, in the absence of proof *aliunde*. *Hersey v. Walsh*, 689.
3. **WHERE JUDGMENT BY DEFAULT, IN ACTION FOR CONVERSION OF PROMISSORY NOTE, IS ENTERED** by the clerk for the proper amount of damages, such judgment will not be treated as absolutely void because it was entered without any order or direction of the court, nor will it be set aside for such irregularity merely, especially after considerable delay. *Id.*

4. JUDGMENT RENDERED BY COURT OF GENERAL JURISDICTION AGAINST PARTY AFTER HIS DEATH is not for that reason void. It may be erroneous, but until reversed by some appropriate proceeding, it is valid. *Mitchell v. Schoonover*, 282.
5. NUNC PRO TUNC ENTRY OF JUDGMENT. — IF PLAINTIFF IN ACTION IS ENTITLED TO JUDGMENT without further contest, or if by the court's delay he fails to obtain judgment when entitled to it, and the adverse party dies, it is the duty of the court to enter judgment in his favor as of a time when the adverse party was living. *Id.*
6. JUDGMENT OF NONSUIT IS NOT SUFFICIENT where the defendant makes out a clear and satisfactory defense entitling him to a final judgment. *Linman v. Riggins*, 549.
7. ATTORNEY'S FEES MAY BE INCLUDED IN JUDGMENT BY CONFESSION AUTHORIZED BY WARRANT OF ATTORNEY. — Stipulation by which a debtor agrees to pay fees of his creditor's attorney in case the latter is compelled to resort to legal proceedings to collect his debt is an agreement which is not only eminently just, but which rests upon a good and valuable consideration. *Weigley v. Matson*, 335.
8. STAY OF EXECUTION. — TIME DURING WHICH EXECUTION IS STAYED by the court, at the instance of the judgment debtor, must be excluded from the computation of the five years after entry of judgment allowed by the Minnesota statute for enforcing it. *Wakefield v. Brown*, 671.
9. NOTICE OF TRANSFER OF JUDGMENT MUST BE GIVEN TO JUDGMENT DEBTOR, unless it be clearly shown that he had knowledge of the transfer, and if he settles with his creditor before notification or knowledge of the transfer, he is discharged from the debt. The mere filing of the transfer among the papers in the suit, and the recording of it in the books of the parish recorder, are not equivalent to the notice required by law. *Johnson v. Boice*, 528.
10. CUSTODIAN OF JUDICIAL RECORDS, IN GIVING COPIES, need set them out only as the originals appear, and so certify. The failure to certify that an affidavit contained therein was made by the party who on the face of the copy appears to have made it is unimportant. *Ward v. Sutor*, 606.
11. TEST WHETHER FORMER JUDGMENT IS A BAR generally is, whether or not the same evidence will sustain both the present and the former action; if different proofs are required to sustain the two actions, a judgment in one is no bar to the other. *Gayer v. Parker*, 227.
12. RES ADJUDICATA. — WHERE IN ACTION UPON TWO OF THREE NOTES given for the purchase price of a reaper, it is shown that in an action upon the other note between the same parties, defendant alleged a breach of warranty in the sale of the machine, damages therefor, and that two other negotiable notes had been executed and delivered to plaintiff, whereupon defendant had judgment for damages for the amount of the purchase price of the machine, such judgment is not a bar to the present action founded upon the notes mentioned in the answer to the former action, but it is a bar to the defense therein as to the breach of warranty in the sale of the machine pleaded and recovered on in the former action. *Knorr v. Peerless Reaper Co.*, 140.
13. RECORD OF FORMER ACTION AND RECOVERY AS EVIDENCE IN SUBSEQUENT ACTION. — In an action to recover damages for injuries resulting from a permanent obstruction of a watercourse, and the conse-

quent overflowing of the plaintiff's land, the record of a former action and recovery for the same cause, for damages sustained prior to the commencement of this action, is properly admissible in evidence upon the same issues involved in both actions. *Byrne v. Minneapolis etc. R'y Co.*, 668.

14. **FORMER RECOVERY FOR INJURIES RESULTING FROM NUISANCE DOES NOT BAR** a recovery for subsequent injuries from a continuance of the same nuisance. *Id.*
15. **PLEADING JURISDICTION.**—In an action in Nebraska on a judgment rendered by the circuit court of Boone County, Indiana, it is not necessary to allege in direct terms that the foreign court is a court of general jurisdiction, nor that jurisdiction was acquired by personal service of summons, nor that judgment was rendered as required by statute. The court in which the action is brought will take judicial notice that the court rendering the judgment had general jurisdiction. *Specklemeyer v. Dailey*, 119.
16. **VACATION OF JUDGMENTS—INHERENT POWER OF COURTS TO ORDER, IRRESPECTIVE OF LAPSE OF TIME.**—Power of the court to vacate judgments is not restricted by section 724 of the code, authorizing motions to be made for relief against judgments taken against the moving party, through his "mistake, inadvertence, or excusable neglect." Its power does not depend on any statute, but is inherent. *Ladd v. Stevenson*, 748.
17. **VACATION OF JUDGMENT, WHO MAY MOVE FOR.**—ONE WHO PURCHASES PROPERTY AFTER NOTICE OF THE ACTION has been filed, and who is therefore bound by any judgment which may be entered therein, bears such a relation to the action that he may, under the code of New York, claim to be made a party during the pendency of the action, and may also move the court for the vacation of any judgment affecting his rights. *Id.*
18. **FOR PURPOSE OF DEFEATING JUDGMENT RENDERED** by a court of general jurisdiction, the legal representative of a deceased party will not be heard to allege that on the day of the rendition of such judgment, but at an hour previous thereto, his intestate died. *Mitchell v. Schoonover*, 282.

JUDICIAL SALES.

1. **PURCHASER AT JUDICIAL SALE SHOULD NOT BE COMPELLED TO ACCEPT DOUBTFUL TITLE.** Purchaser at partition sale should be released from his bid, if it appears that there were persons, not parties to the suit, who were interested in the property, unless incapacitated to take by reason of alienage. They should have been made parties to the proceeding for partition, and the question of alienage there tried. *Toole v. Toole*, 750.
2. **PURCHASER AT SHOULD BE RELEASED FROM HIS BID**, if the title appears to be doubtful at the time when he becomes entitled to a deed. It is error for the court in such a case, instead of releasing the purchaser, to continue the cause for the purpose of taking testimony respecting the claims of absent parties. His contract should not be converted into one holding him to performance indefinitely, or until such time as the title can be perfected. *Id.*
3. **CONFIRMATION OR VACATION OF.**—It is difficult to lay down a general rule by which to determine whether a judicial sale will be confirmed or set aside. The approval or disapproval of such sale rests in the dis-

cretion of the court, and depends in a great measure upon the circumstances of each case. *Moran v. Clark*, 66.

- a. **SETTING ASIDE — INADEQUACY OF PRICE.** — Where there have been two public sales of property, not far apart in time, one under a trust deed, the other a judicial sale, at both of which the property brought the same price, and affidavits are filed, stating that affiants believe that in the near future the property could be sold at an advance of from five hundred to one thousand dollars over the price for which it was sold, and another affidavit states that the property was sold for a fair valuation, the court properly refused to set aside the sale on the ground of mere inadequacy of price. *Id.*

See **EXECUTIONS; EXECUTORS AND ADMINISTRATORS**, 5, 6.

JURISDICTION.

WHERE COURT ACQUIRES JURISDICTION OVER SUBJECT-MATTER AND PERSON, it becomes its right and duty to determine every question which may arise in the cause without interference from any other tribunal. *Barton v. Saunders*, 261.

See **APPEAL**, 8; **ATTACHMENT**, 17.

JURY.

As GENERAL PROPOSITION, IT IS RIGHT OF JURY TO JUDGE OF SUFFICIENCY of the evidence introduced to establish any one or more facts in the case upon trial; but when there is a total defect of evidence as to any essential fact, the case should be withdrawn from the consideration of the jury. *Mynning v. Detroit, Lansing, and Northern Railroad Company*, 804.

JUSTIFIABLE HOMICIDE.

See **HOMICIDE**, 8, 10-13, 15; **INSTRUCTIONS**, 4, 5.

LACHES.

See **EQUITY**, 2-4.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT. — CONVEYANCE OF LEASED PREMISES CARRIES WITH IT THE RIGHT TO ALL RENTS** subsequently falling due. *Eiseley v. Spooner*, 128.
2. **LESSEE IS UNDER OBLIGATION TO USE THE LEASED PREMISES IN PROPER AND TENANTABLE MANNER**, and not to expose the buildings to ruin or waste by acts of commission or omission. *Powell v. Dayton etc. R. R. Co.*, 251.
3. **TENANT HAVING, BY THE TERMS OF HIS LEASE, THE PRIVILEGE OF PURCHASING THE PREMISES**, remains, until such privilege has been availed of, a mere tenant, subject to the same obligations as other tenants, and answerable for any waste committed by him; but his liability to suit for waste is suspended until it is known whether or not he will avail himself of his privilege. Hence, the statute of limitations will not commence to run in his favor against an action for waste until the termination of his tenancy, or until it is otherwise known that he will not become a purchaser under the privilege given him in such lease. *Id.*

4. **LESSEE IS ANSWERABLE TO LESSOR FOR WASTE, BY WHOMSOEVER COMMITTED**, and may have his action over against the wrong-doer. *Id.*
5. **LESSEE IS ANSWERABLE FOR WASTE COMMITTED BY A RECEIVER OF ITS PROPERTY**, for whose appointment the lessor was in no way responsible. *Id.*
6. **ELECTION TO SUE ON A CONTRACT TO PURCHASE REALTY** will not preclude the plaintiff from suing for damages for waste committed on the same property by the defendant while a lessee thereof, if the plaintiff had no cause of action, and failed in the first suit because the defendant had never elected to purchase the property. There can be no election unless concurrent remedies exist between which the plaintiff had the right to elect. *Id.*
7. **OPTION OF LESSEE TO PURCHASE — WHEN NOT MATERIAL WHETHER LESSOR OR HIS GRANTEE GIVE NOTICE.** — Where the contract is in any wise unilateral, as in case of an option to purchase, any delay in the party in whose favor the contract is binding is looked at with especial strictness, and where premises are leased with the option to the lessee to purchase within a time limited, after notice is given him of an offer of sale by a third party, and such offer is actually made and a deed of the same executed to such party, it is not material in a court of equity whether the lessor or the grantee give the required notice. *Harding v. Gibbs*, 345.
8. **OPTION TO PURCHASE — CONSTRUCTION OF CONTRACT.** — Where premises are leased with the right given lessee to purchase within one year, and a further proviso that if the lessor should receive an offer for the property, ten days' notice should be given lessee, and he should then have the privilege of purchasing on certain terms within a time limited, and if he did not purchase the lessor might sell, this will not be construed as an absolute option of purchase within one year, but that the lessee must make his election in ten days after receiving notice of an offer by a third party to purchase, and if he did not then elect, the lessor was at liberty to sell, although such offer was made within the year. *Id.*

LARCENY.

PRESUMPTION OF GUILT FROM POSSESSION OF STOLEN PROPERTY by accused, and his failure to explain when called upon to do so, depends upon whether such possession was recent or remote; if too remote, he is not bound to explain at all, as where the property stolen was a cow, and was found in possession of the accused two years after the theft. *Mallock v. State*, 451.

LEGACIES.

1. **WHEN NOT CHARGEABLE AGAINST RESIDUARY DEVISEE.** — General language in a will giving legacies, followed by the usual residuary clause, is not alone sufficient to charge the legacies on the realty, but such language will justify such charge if it is made to appear by extrinsic circumstances — such as may, under the rules of law, be resorted to to aid in the interpretation of written instruments — that it was the testator's intention that the legacies should be charged on the land. *Brill v. Wright*, 717.
2. **INTENT TO CHARGE LEGACIES UPON THE REALTY CANNOT BE INFERRED** from the fact that, after the usual introductory clause, the will proceeds as follows: "First, after all my lawful debts are paid and discharged, I give and bequeath to J. S. the sum of two thousand dollars. Secondly, I

give and bequeath all the rest and residue of my real and personal estate to J. C." *Id.*

3. **BURDEN OF ESTABLISHING THAT A LEGACY IS TO BE CHARGED AGAINST THE REAL ESTATE** rests upon the legatee who is seeking to have such charge imposed. *Id.*

LEGISLATIVE POWER.

See CONSTITUTIONAL LAW, 1, 2.

LEVY.

See ATTACHMENT, 15, 18.

LIBEL AND SLANDER.

1. **LIBEL.** — PRINCIPLE WHICH ALLOWS PROOF OF PROVOCATION IN MITIGATION OF DAMAGES IS INAPPLICABLE, where it is sought to prove, in mitigation of damages in an action for libel, that the alleged libelous publication was induced by the hasty promptings of passion, caused by a previous provoking publication at the instance of the plaintiff, in itself irrelevant to the issue in the action, if there had been time and opportunity for hot blood to cool. And the answer in such case, alleging that the publication which induced the libel in question was made the day before the latter publication, but not stating when it came to the knowledge of the defendant, may be properly stricken out. *Quinby v. Minnesota Tribune Company*, 693.
2. **SLANDER.** — TIME OF THE COMMISSION OF THE ALLEGED OFFENSE MUST BE SHOWN by prosecution; failure to do so is fatal to a conviction. *Stichtel v. State*, 444.
3. **ORAL SLANDER CHARGED IN INFORMATION AS UTTERED IN ENGLISH CANNOT BE PROVEN TO HAVE BEEN UTTERED IN GERMAN**, although said words when interpreted mean exactly the same as the slanderous words set forth in the information. *Id.*

LIEN.

See BANKS AND BANKING, 10, 11.

LIFE INSURANCE.

See INSURANCE, 10-22.

LOST PROPERTY.

See PERSONAL PROPERTY, 1-4.

MAIMING.

1. **WHEN QUESTION IS FOR COURT OR FOR JURY.** — To deprive one of a front tooth is to maim him at the common law, and is within the import of the word "member" as used in the Texas Penal Code, and in common acceptance, and the court may assume, without submitting the question to the jury, that a front tooth is a "member" of the body, but the question whether a "corner tooth" is a "front tooth" may become a question of fact to be found by the jury. *Hugh v. State*, 488.
2. **THE INTENTION TO COMMIT AN OFFENSE IS PRESUMED WHENEVER THE MEANS USED IS SUCH** as would ordinarily result in the commission of
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the forbidden act: Texas Penal Code, art. 50; and this applies to a case of maiming, to the exclusion of a claim that deceased did not intend to "maim" defendant, and that therefore the act was not "willfully and maliciously" done, which latter is an essential element of the offense of maiming under the Texas Penal Code, article 507. *Id.*

3. QUESTION FOR THE JURY — INSTRUCTIONS. — IN ORDER TO MAKE KILLING JUSTIFIABLE IN CASES OF MAIMING, THERE MUST BE A "MISTREATING WITH VIOLENCE" at the time of the homicide, though the offense itself may have been completed before the killing: Texas Penal Code, art. 570, subd. 6. And where the blow struck by the deceased, defendant's injury, his fall, subsequent recovery, and firing of a pistol, all appear to have been instantaneous acts, it is for the jury to determine whether there was any cessation of active hostilities and violence, and it is error to refuse instructions relating thereto. *Id.*

MALICIOUS PROSECUTION.

1. ONE WHO MALICIOUSLY AND WITHOUT PROBABLE CAUSE PUTS INTO OPERATION the machinery of judicial proceedings which results in the arrest and trial of the accused, thereby incurs liability from which, when sued for malicious prosecution, he is not relieved by the fact that the subsequent proceedings in the prosecution so begun, and in a court having jurisdiction of the subject-matter, were so irregular that had a conviction resulted the judgment would have been a nullity. *Ward v. Sutor*, 606.
2. IN SUIT FOR MALICIOUS PROSECUTION, THE FACT that the court before which the proceedings in the prosecution sued for were had had no jurisdiction to try the cause is not sufficient ground for excluding the transcript of the prosecution proceedings, when offered in evidence for the purpose of showing the affidavit, the criminal information based thereon, and the verdict of the jury in the case. *Id.*

MANDAMUS.

1. LIES TO COMPEL CONSTITUTIONAL EXECUTIVE OFFICERS TO PERFORM DUTIES required of them by law. *State ex rel. Patton v. Houston*, 532.
2. PUBLIC OFFICERS CHARGED WITH SPECIFIC MINISTERIAL DUTIES IN ELECTION MATTERS may be compelled by *mandamus* to perform such duties. *Id.*
3. REGISTRAR REQUIRED BY LAW TO APPOINT COMMISSIONERS TEN DAYS BEFORE ELECTION, and to publish them six days before the election, who has violated his legal duty in the selection of such commissioners, may be compelled by *mandamus* to undo or to correct what he has done. The object of the law requiring him to act a certain time before the election is to afford an opportunity to correct any violation of his duty which he may commit. *Id.*
4. SUPERVISORY JURISDICTION OF SUPREME COURT IS DISTINCT FROM ITS APPELLATE JURISDICTION, and questions determinable by it in the exercise of the latter only cannot be considered by it in a proceeding invoking the exercise of the former jurisdiction. *Id.*

MANSLAUGHTER.

See HOMICIDE, 1, 6, 7, 9.

MARSHALING ASSETS.

See EQUITY, 6-8.

MASTER AND SERVANT.

1. **MASTER IS LIABLE FOR DAMAGE OCCASIONED BY HIS SERVANTS in the exercise of the functions in which they are employed.** And the tendency of modern jurisprudence is to hold him liable, not only for the negligence, but also for the torts of his servants, when done within the scope of their employment. *Williams v. Pullman Palace Car Co.*, 512.
2. **RATIFICATION CANNOT BE INFERRED FROM ACTS WHICH MAY BE READILY EXPLAINED** without involving any intention to ratify. A company cannot, therefore, be held to have ratified an assault and battery committed by its servant, by retaining him in its service, where it believed his account of the affair, and thought it just to maintain the *status quo* until a judicial determination of the matter had been had. Nor is the case affected by the fact that the servant was criminally convicted of assault and battery, where he was not permitted to testify in his own defense, and he might have been so convicted on evidence falling far short of the outrage charged. *Id.*
3. **GENERAL DOCTRINE THAT MASTER IS NOT LIABLE FOR INJURIES** caused by the negligence of a fellow-servant engaged in the same common employment is now regarded as settled law. The reason commonly assigned for this exemption is, that by his contract of employment, the servant assumes the risks incident to it, and that both he and his master had them in contemplation in fixing the compensation. *Anderson v. Bennett*, 311.
4. **LATER CURRENT OF JUDICIAL DECISION, AS WELL AS LEGISLATIVE ACTION,** indicates a marked departure from the general rule, that all servants employed by the same master, and working under the same control and in a common employment, are fellow-servants, and a disposition is manifested to so limit and restrict the rule as shall make the master answerable for his just share of responsibility to his servant for injuries sustained in his employment. *Id.*
5. **MARKED CHANGE IS TAKING PLACE FROM OLD RULE OF LAW** as to servants clothed with partial authority only, such as a foreman or upper servant, upon the principle that when a master delegates any duty which he owes to his servants, he is liable for its proper performance. *Id.*
6. **CONCLUSION TO BE DEDUCED FROM LATER AUTHORITIES IS, THAT MASTER IS CHARGEABLE** for any act of negligence in so far as the servant is charged with the performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and instrumentalities, the providing of a reasonably safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils, which may be guarded against by proper diligence, etc.; and to the extent of the discharge of these duties which the master owes to his servants by the middle-man or vice-principal, the latter stands in the place of the master. *Id.*
7. **MASTER OWES DUTY TO EVERY SERVANT TO PROVIDE a reasonably safe place** at which to work, consistently with the nature of the undertaking, and although he is not an insurer, he is bound on the same principle by the law to exercise due and proper care in this regard as he is

in hiring competent servants, or in supplying reasonably safe machinery or other appliances for the use of his servants. This is regarded as a personal or absolute obligation, and if it is intrusted to a servant, such servant is the representative of the master, and any negligence on his part is the negligence of the master. *Id.*

8. MASTER'S OBLIGATION NOT TO EXPOSE SERVANT TO PERILS which by proper diligence may be guarded against becomes more important, and the degree of diligence and care to be exercised in its performance the greater, in proportion to the dangers which may be encountered. *Id.*
9. WHERE MASTER WAS NOT PERSONALLY PRESENT AND DID NOT PROMULGATE or establish any suitable or needful rules and regulations for the safe and proper conduct of the work, and the direct management or execution of the work during his term was placed in charge of a superintendent or foreman, there necessarily devolved upon him the duties in this particular which the master owed to his servants. As a consequence, it became the duty of such foreman to provide for the safety of the servants under his control and subject to his commands, by the exercise of such care in the management and conduct of the undertaking intrusted to him as would render reasonably safe the place at which the employees must apply the machinery and do their work; failing in which, his negligence should be deemed the negligence of the master. *Id.*
10. NEGLIGENCE. — RAILROAD COMPANY is not liable if servant in causing injury to another is not acting within the scope of his employment; but master is responsible, where servant acts within the general scope of his employment, for acts done while engaged in his master's business, with a view to the furtherance of that business, by which injury is caused to another, whether negligently or wantonly committed. *Chicago etc. R'y Co. v. West*, 380.
11. NEGLIGENCE. — IT IS THE DUTY OF AN EMPLOYEE, who continues in the service after the discovery of defects in the machinery in use connected with the service affecting his safety, and which render his employment more than ordinarily dangerous, to inform the employer, and if the latter promises to repair in a reasonable time, the former will not be held to have waived the defects or assumed the risks until a reasonable time has elapsed after the promise. *Gulf, Colorado, and Santa Fe Railway Co. v. Donnelly*, 608.
12. TO CONSTITUTE ASSUMPTION OR RISKS BY SERVANT, it is not necessarily enough that he knew, or ought to have known, the actual character and condition of the defective instrumentalities furnished for his use; but he must also have understood, or, by the exercise of ordinary observation, ought to have understood, the risks to which he is exposed by their use. *Rolseth v. Smith*, 637.
13. FELLOW-SERVANTS, WHO ARE — A COMMON MASTER IS ESSENTIAL TO THE RELATION OF FELLOW-SERVANTS. — If, therefore, the servant of one railroad company is injured by the negligence of those of another, he is entitled to recover of the latter, though both companies were entitled to use, and were using, the track and premises at which he was working when injured. *Sullivan v. Tioga Railway Company*, 793.
14. A SUPERINTENDENT UPON WHOM IS DEVOLVED the whole management and control of work, and who is authorized to employ and discharge workmen, to regulate and direct the manner of their work, to provide the means and appliances necessary for its prosecution, and to determine the time and place of its employment, may be regarded as standing

in the place of his master, and while in the discharge of his duties as such superintendent he is not deemed a fellow-servant with the other employees of his master who are under his control. *Hussey v. Coger*, 787.

15. A SUPERINTENDENT OR VICE-PRINCIPAL MUST BE REGARDED AS A FELLOW-SERVANT with other employees of his master who are under his charge and control, when he is not discharging the duties of superintendent or vice-principal, but is engaged in the performance of duties which properly belong to an ordinary servant or employee. Hence, where a servant was injured from the negligence of his superintendent in directing operations respecting the uncovering of a hatchway, it was held that the defendant could not recover of the master for the injuries suffered, because the superintendent was not at the time acting as such, but was rather discharging the duties of a fellow-servant. *Id.*

See RAILROAD COMPANIES, 30-38.

MORTGAGES.

1. LIEN OF CHATTEL MORTGAGE IS DIVESTED BY ABSOLUTE TENDER, kept good, of the amount due on the mortgage note. *Knox v. Williams*, 220.
2. HOLDER OF MORTGAGE GIVEN FOR PRECEDENT DEBT is a purchaser for value. *Hanold v. Kays*, 835.
3. NAME OF MORTGAGEE. — INSTRUMENT IN FORM OF MORTGAGEE, COMPLETE IN EVERY PARTICULAR except that the name of the mortgagee is left blank, cannot be given validity by the insertion of the name of a mortgagee by an agent to whom the mortgagor delivered the instrument, with authority to fill the blank and procure money from any person who would advance it upon the instrument as security. *Shirley v. Burch*, 273.
4. NOTE AND ACCOMPANYING MORTGAGE ARE VOID FOR WANT of legal delivery, where the person named as payee in the former and as mortgagee in the latter never had any knowledge of or interest in the transaction, and the papers were not delivered to him, but to another. *Id.*
5. WHERE EVIDENCE DISCLOSES FACT THAT THERE WAS SUCH PERSON AS THAT NAMED as mortgagee in the mortgage, but that he had no interest in the transaction, and disclaimed any knowledge of or connection with it, in such case the payee of the note and mortgage is to be deemed fictitious. *Id.*
6. COURT OF EQUITY WILL NOT DECREE FORECLOSURE OF MORTGAGE VOID IN LAW because of the want of the name of a proper mortgagee, although all the acts of the plaintiff in the transaction may have been in good faith. *Id.*
7. IMPROVEMENTS BY PURCHASER AFTER FORECLOSURE OF SENIOR MORTGAGE — ACTION BY JUNIOR MORTGAGEE — VALUE OF RENTS AND PROFITS. — Purchaser in good faith of real estate at judicial sale, after foreclosure of senior mortgage, is entitled to credit for improvements as against junior mortgagees, although the latter were not parties to the foreclosure suit. And in an action to compel such purchaser to redeem a junior mortgage, or for a sale of the land, he is not chargeable with the value of rents and profits while in possession. *Higginbottom v. Benson*, 211.
8. FORECLOSURE. — OWNER OF EQUITY OF REDEMPTION IS AN INDISPENSABLE PARTY TO A SUIT for the foreclosure of a mortgage, and if the suit

- proceeds without his being made a party, the decree cannot affect his title. *Landon v. Townshend*, 712.
9. **FORECLOSURE. — THE TITLE OF AN ASSIGNEE IN BANKRUPTCY** held by him in his official capacity is not affected by a foreclosure to which he is made a party defendant, but apparently in his personal capacity only, and without any statement in the complaint showing that it was intended to proceed against him as the assignee in bankruptcy of the original mortgagor. *Id.*
 10. **FORECLOSURE OF MORTGAGE BY ADVERTISEMENT, AFTER DEATH OF MORTGAGEE**, upon a notice of sale purporting to be by his authority, is a nullity, and cannot be made effectual by proof that the notice was in fact given by another person, who conducted the proceeding in good faith, and really in his own behalf. *Bausman v. Kelley*, 661.
 11. **IT IS ESSENTIAL QUALITY OF NOTICE THAT IT APPEAR** to be given by competent authority, and a notice by a mere stranger can effect nothing. *Id.*
 12. **MERE POSSESSION OF NOTE, AND MORTGAGE GIVEN TO SECURE IT**, by a person other than the payee (and mortgagee) to whose order the note was payable, and the same being undorsed by him, does not show ownership in such person. *Id.*
 13. **MINNESOTA STATUTE, LAWS OF 1883, CHAPTER 112, INTERPOSING LIMITATION** upon the right to avoid a statutory foreclosure of a mortgage, has no application to a case where the authority to exercise the power was wholly wanting, and where the notice and sale were wholly unauthorized, and not merely irregular by reason of some want of conformity with the statute. *Id.*

MUNICIPAL CORPORATIONS.

1. **IMPOSITION BY MUNICIPAL ORDINANCE OF CERTAIN ANNUAL CHARGE PER POLE**, as "a consideration for the privilege," upon the poles of a telephone company already established, and paying taxes on its property and a license for carrying on its business, is neither a tax nor a license, nor an exercise of the taxing power in any respect. Nor can it be upheld as a police regulation, since it involves no consideration whatever of public morals, health, or convenience. *City of New Orleans v. Great Southern Telephone and Telegraph Co.*, 502.
2. **MUNICIPAL ORDINANCE, WHEN A CONTRACT. — A municipal ordinance** which grants to a company authority to construct and maintain telephone lines on the streets of a city, without any limitation as to time, and for a consideration therein named, is, when accepted and acted upon by the grantee by complying with its conditions and constructing a valuable plant, a contract with the city, which cannot thereafter be abolished or altered in its essential terms without the consent of the grantee. *Id.*
3. **PROVISO IN MUNICIPAL ORDINANCE GRANTING FRANCHISE TO COMPANY**, that its acts and doings under the ordinance shall be subject to future ordinances of the city, does not convert the grant into a mere revocable permit. It merely subjects such acts and doings to municipal regulations not conflicting with the ordinance itself. *Id.*
4. **DEFECTIVE SIDEWALK — CONTRIBUTORY NEGLIGENCE. — Whether a stranger exercising ordinary care and prudence in passing along the sidewalk of an incorporated village after dark should have turned back and abandoned his purpose upon ascertaining that there was an apparent**

break in the sidewalk, in falling from which he received injury, or should have continued in his endeavor to proceed, is a question for the jury, under proper instructions, and when the latter are given, the verdict will not be disturbed. *Village of Ponca v. Crawford*, 144.

5. **SIDEWALK TO BE SAFE** need not be wide, very permanently built, of costly material, nor continuous throughout the length of the street; but when built or suffered to remain on a part of the street, its ends or termini must be so graduated to the natural level of the street as to permit pedestrians to safely pass from it without being obliged to climb down over obstructions. *Id.*
6. **DEFECTIVE SIDEWALKS — NOTICE.** — Sidewalks in incorporated villages are usually built by abutting property owners under ordinances or by-laws, and not from the city's finances. Therefore no amount of knowledge on the part of the plaintiff of the low state of the finances of the village is sufficient to charge him with legal notice of a defect in the sidewalk by reason of which he sustained the injury complained of. *Id.*
7. **NOTICE OF DEFECT IN SIDEWALK.** — After a sidewalk has been placed in position, no matter by whom or by what authority, and the city authorities have notice of a defect therein, or it has been built so long that knowledge is presumed, the city is as liable as though the sidewalk had been built by its express authority. *Id.*
8. **GAS COMPANY HAS NO RIGHT TO INDEFINITELY KEEP LAMP-POSTS ON CORNER OF STREETS** of a city after its contract to supply the city with gas has expired, and it has ceased to supply any gas thereto. A charter from the state to such company granting it the right to lay gas mains about the streets of the city does not confer upon it authority to put up and keep lamp-posts upon the public streets or corners, when the community is not actually benefited thereby. *New Orleans Gas Light Company v. Hart*, 544.
9. **ONLY THOSE ASSERTING SIMILAR CONFLICTING RIGHT CAN CONTROVERT** a right granted by a city to other persons to erect towers or supports to carry wires for electric purposes, and to remove obstructions to such erections. *Id.*
10. **CITY OF NEW ORLEANS HAS RIGHT, IN EXERCISE OF ITS POLICE POWER,** TO REMOVE OBSTRUCTIONS to the erection of towers for electric lights, for the public benefit and convenience, and may delegate that power. *Id.*
11. **POLICE POWER IS RIGHT OF STATE OR OF STATE FUNCTIONARY TO PRESCRIBE REGULATIONS** for the good order, peace, protection, comfort, and convenience of the community, which do not encroach on the like power vested in Congress by the federal constitution. *Id.*
12. **VILLAGE OF ARAPAHOE, NEBRASKA, IS DE FACTO CORPORATION,** and was authorized to transact business from the year 1873 to 1879, where, upon the facts stated, it appeared that in 1873 it was organized, and continued such organization down to 1879, when it was reorganized, and that officers were elected each year, except the year 1877. *Arapahoe Village v. Albee*, 202.

MURDER.

See HOMICIDE.

MUTUAL BENEFIT SOCIETY.

FORFEITURES ARE NOT FAVORED IN LAW; and if a mutual benefit association, although its charter provides only for giving notice of assessments

due by posting thereof, adopts and continues for a long time the practice of sending written notices by mail to a certain class of members, a member of that class is justified in believing that such written notice will be sent to him, and in acting upon such belief; and if his failure to pay an assessment is solely due to want of such notice, and he offers to pay the same as soon as he obtains information thereof, the association will be estopped from claiming the forfeiture of his membership, and denying his right to recover because of such supposed forfeiture. *Gunther v. New Orleans etc. Ass'n*, 554.

NEGLIGENCE.

1. **NEGLIGENCE IS IN LAW A RELATIVE TERM**, and implies the non-observance of or omission to perform a duty which is prescribed by law, or it arises from the situation of the parties and circumstances surrounding the transaction. *Kelly v. Michigan Central R. R. Co.*, 876.
2. **NEGLIGENCE IS RELATIVE TERM**, and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances usually impose. *Hays v. Gainesville Street Railway Co.*, 624.
3. **IN DETERMINING WHETHER IT IS ACT OF NEGLIGENCE** to go upon a street-car track, the frequency of the passage of cars, their usual rate of speed, whether many people are accustomed to cross at the particular place, whether there is a duty imposed by law upon the drivers to keep a lookout, and give warning of approaching danger, and the like circumstances, may be taken into consideration. *Id.*
4. **WHERE CITY ORDINANCE UNDER WHICH STREET-CAR RAILWAY COMPANY IS INCORPORATED, MAKES IT THE DUTY** of the car-driver to keep a vigilant lookout for all persons approaching the track, and to stop the car on the first appearance of danger, a failure to perform this duty is of itself an act of negligence. *Id.*
5. **TERM "GROSS NEGLIGENCE" INCLUDES ALL LESSER DEGREES** of negligence, and when the plaintiff's petition charges that an act was done through gross negligence, this does not preclude evidence entitling him to recover for a lesser degree. *Id.*
6. **ALTHOUGH NEGLIGENCE OF PERSON INJURED BY ANOTHER MAY CONTRIBUTE** to the injury, yet if the person inflicting it discovers the peril of the other in time, by the reasonable exercise of the means at hand, to prevent the injury, the law considers the failure to use such means as the proximate cause of the injury, and will permit a recovery, notwithstanding the injured party was guilty of contributory negligence. *Id.*
7. **OWNER OF REAL PROPERTY IS ENTITLED TO ITS EXCLUSIVE USE** and enjoyment, and is not liable to others for injuries occasioned by its unsafe condition, when the person sustaining the injury was not at or near the place of danger by lawful right, and when the owner has neither expressly nor impliedly invited him there, nor allured him by attractions or inducements exhibited or held out in some way calculated to lead him into danger, without giving notice of the peril to be avoided. *Galveston Oil Co. v. Morton*, 611.
8. **DAMAGES ARE NOT RECOVERABLE BY A TRESPASSER** or mere licensee who is injured by any dangerous machine or contrivance on the land or premises of another, unless the contrivance is such as the owner may not lawfully erect or use, or when the injury is inflicted willfully, wantonly, or through the gross negligence of the owner or occupier of the premises. *Id.*

9. ONE WHO ENTERS THE PREMISES OF ANOTHER OF HIS OWN VOLITION, on his own exclusively personal business, not being an employee, or invited by the owner of the premises or those in charge, is not entitled to recover damages for injuries inflicted by machinery in operation on the premises, while he was passing through a place where employees usually go, and in which only mechanical operations are usually performed, by means of appliances not dangerous from their location and use to persons familiar with the locality. *Id.*
10. OWNER OF PROPERTY WHO HAS BEEN ACCUSTOMED TO ALLOW OTHERS a permissive use of it, such as tends to produce confident belief that the use will not be objected to, and therefore to act on the belief accordingly, must be held to exercise his rights in view of the circumstances, so as not to mislead others to their injury without a proper warning of his intention to recall the permission. *Houston etc. R'y Co. v. Boozer*, 615.
11. DEGREE OF CARE REQUIRED IN ORDER TO AVOID LIABILITY FOR NEGLIGENCE must be proportioned to the nature of the act performed, the place where performed, and the extent of danger and injury likely to result from a failure to use due care in avoidance of injury to others. *Id.*
12. IT CANNOT BE HELD THAT THE SAME DEGREE OF CARE SHOULD BE EXACTED of a child in crossing a railroad track as must be of an adult, in order to avoid the imputation of contributory negligence. Whether the child used such care in attempting to cross the track, and in ascertaining the danger that attended his act, as would be incumbent on one of his age, is a question for the jury. *Id.*
13. RULE IS NOT UNIVERSAL THAT DEFENDANT IS EXCUSED FROM LIABILITY merely because the plaintiff, knowing of the danger caused by the defendant's negligence, voluntarily incurs it. If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, or if, by the defendant's negligence, the plaintiff is placed in a situation of peril, to escape which he voluntarily incurs another danger, the defendant is liable, although the plaintiff may not in the emergency have pursued the course which ordinary prudence would have dictated. *Harris v. Township of Clinton*, 842.
14. EMERGENCIES MAY SOMETIMES BE GIVEN IN EVIDENCE, and will justify what would otherwise be an indefensible act; such, for instance, as that of an engineer standing at his post in the endeavor to save the lives of the passengers or others when a collision is imminent, or of a person rushing in front of an engine to save the life of a child, or placing himself in a position of danger to save the life of another. But evidence of the ill health of the plaintiff's wife, and his anxiety to reach home, is properly excluded. *Id.*
15. REFUSING TO SUBMIT TO SURGICAL OPERATION. — Where death has been occasioned by negligence, the administrator of the decedent cannot be precluded from recovering, as a matter of law, because he rejected the advice of his physician, and refused to submit his limb to amputation, when it appears that the question of whether the death was due to the rejection of such advice was properly submitted to the jury, and answered by their verdict in favor of the plaintiff. *Sullivan v. Tioga R'y Co.*, 793.
16. ABSENCE OF CONTRIBUTORY NEGLIGENCE IS NOT NECESSARY TO BE SHOWN beyond cavil or question. If the circumstances are such that reasonable minds might draw different conclusions respecting the plain-

tiff's fault, he is entitled to go to the jury upon the facts, the judge taking the case from the jury only when it is susceptible of but one just opinion. *Mynning v. Detroit etc. R. R. Co.*, 804.

17. NEGLIGENCE IN ATTEMPTING TO BOARD A MOVING TRAIN. — One who, in the full possession of his faculties, and with nothing to disturb his judgment, attempts to board a train then moving at from four to six miles an hour, will be adjudged, as a matter of law, guilty of such want of ordinary care as will preclude a recovery for injuries by him sustained, although the conductor of the train told him "to jump on if he was going." *Hunter v. Cooperstown and Susquehanna Valley R. R. Co.*, 752.
18. PLEADING. — ALLEGATION OF NEGLIGENCE, as applied to the conduct of a party, is not a mere conclusion of law, but a statement of an ultimate fact properly pleadable. *Rolseth v. Smith*, 637.
19. COMPLAINT IN ACTION FOR DAMAGES FOR PERSONAL INJURIES, which alleges various things the defendant negligently and carelessly did, or omitted to do, and causing the injuries complained of, is not demurrable as not stating a cause of action, unless the particular acts or omissions complained of are such that they could not be negligent under any possible state of facts or circumstances provable under the allegations of the complaint. *Id.*
20. CONTRIBUTORY NEGLIGENCE IS PURELY MATTER OF DEFENSE, which the plaintiff is not bound to negative in his complaint. *Id.*
21. CONTRIBUTORY NEGLIGENCE. — COURT CANNOT SAY, AS MATTER OF LAW, that it appears from the allegations of the complaint that the plaintiff was guilty of contributory negligence, or had voluntarily assumed all the risks which concurred in causing his injury, unless these allegations so clearly show that fact that there could be no reasonable ground for different minds arriving at different conclusions upon the question, under any possible evidence admissible under the pleading. *Id.*

See HIGHWAYS, 1-3; MASTER AND SERVANT, 3-11.

NEGOTIABLE INSTRUMENTS.

1. PROMISSORY NOTE, WHAT IS NOT — CONTRACTS. — INSTRUMENT IN WRITING, WHEREBY ONE PARTY AGREES to pay a certain sum of money on or before a given date to another party, upon the completion by the latter of certain work agreed to be performed for the former, is not a promissory note, and no recovery can be had upon the instrument without proof of performance of the work named therein. *Chandler v. Carey*, 814.
2. FILLING BLANK in the lower margin of a note, naming a date for its maturity, does not make the note payable on such date, but it remains payable on the date named in the body of the note. *Fisk v. McNeal*, 102.
3. STATUTE OF LIMITATIONS is a good defense to an action on a promissory note instituted more than five years after its maturity as shown by the date named in the body of the note, but less than five years after maturity as shown by the date named in the margin of the note. *Id.*
4. DISCHARGE OF PRE-EXISTING DEBT IS AS GOOD CONSIDERATION for the transfer of a negotiable instrument as the payment of money, or the delivery of any other species of property. *Hanold v. Kays*, 835.

NEW TRIAL.

ACTION OF TRIAL COURT IN SETTING ASIDE VERDICT not supported by a clear preponderance of evidence, and granting a new trial, should be

sustained, unless the result is affected by some other consideration. *Cable v. Byrne*, 696.

NUISANCES.

1. **ONE WHO ERECTS AND MAINTAINS A NUISANCE IS LIABLE TO SUCCESSIVE ACTIONS** for damages resulting from its continuance, and he cannot release himself from such liability by a conveyance of the premises. But this liability ceases with his death, and a cause of action does not survive against his legal representatives for damages arising from the continuance of the nuisance subsequent to his death. *Sloggy v. Dilworth*, 656.
2. **EVERY CONTINUANCE OF NUISANCE OR RECURRENCE** of the injury is an additional nuisance, forming in itself the subject-matter of a new action. *Id.*
3. **LIABILITY OF HEIR.** — **ON DEATH OF ANCESTOR, RIGHT OF POSSESSION OF REALTY IS IN HEIR** or devisee until the personal representatives assert their right and take possession by virtue of the statute. And the heir or other person succeeding to the possession can only be made liable after notice and request to abate a nuisance existing on the premises, unless, with knowledge of its character, he has actively interfered, or contributed to injuries resulting therefrom. *Id.*

See DAMAGES, 5.

OFFICE AND OFFICERS.

1. **DE JURE OFFICER**, who has been kept out of his office by the intrusion of another person, may recover, in an action on the case against such intruder, all salary, lawful perquisites, fees, and emoluments which he would have received if he had exercised the office, less the necessary expenses of earning them. *Bier v. Gorrell*, 17.
2. **STATUTE OF LIMITATIONS.** — **OFFICER DE JURE**, who has been kept out of his office by an intruder, may recover, in an action on the case against the latter, all profits received from the office within five years prior to the commencement of the action, but not those received before that time. *Id.*

OFFICIAL BONDS.

1. **SURETIES ON CANNOT SET UP LACHES OR OMISSIONS OF OTHER OFFICER** of the state as a ground of discharge of their own liability; nor is the ineligibility or disqualification of their principal any defense to an action against them on his bond. *State v. Powell*, 522.
2. **CERTIFIED EXTRACTS FROM BOOKS OF AUDITOR OF PUBLIC ACCOUNTS ARE ADMISSIBLE** in evidence in an action on the bond of a defaulting tax collector, and, as public records kept under the requirements of the law, they furnish full *prima facie* proof. *Id.*
3. **TAX COLLECTOR IS PROPERLY CHARGED WITH SUM TOTAL OF TAX ROLLS AND LICENSES**, which he can only offset by legal vouchers for legal payments, and by a delinquent list in due form. He is presumed to have collected all that is on his roll and his number of licenses. *Id.*
4. **TAX COLLECTOR AND HIS SURETIES CANNOT CLAIM CREDITS NOT ENTERED IN AUDITOR'S ACCOUNT.** They are required by law to make their settlements with the auditor, and to see that any offsets to which they are entitled are entered on his books, and if they fail to do so, they must suffer the loss. *Id.*

5. **PAYMENTS BY TAX COLLECTOR ON ACCOUNT OF PRECEDING YEARS WILL NOT RELEASE HIS SURETIES** from liability for moneys collected by him during the term for which they are bound. Such an application of the funds collected by him is as much a misappropriation as if he had used them in the payment of his private debts. *Id.*
6. **POWER OF ATTORNEY TO BIND CONSTITUENT** on "any bond whatsoever" is an express and special authority to bind the constituent on a particular bond. The term "special," as used in the code, does not require a special authority for each particular act. *Id.*

ORDINANCES.

See **MUNICIPAL CORPORATIONS**, 1-3.

PAROL EVIDENCE.

See **ELECTIONS**, 10, 13, 14, 25, 31.

PASSENGERS.

See **RAILROAD COMPANIES**, 1-13.

PAYMENT.

1. **APPLICATION OF PAYMENTS.** — The right of a creditor to apply payment made to him by his debtor to one claim rather than another is confined to cases of voluntary payments. *Orleans County National Bank v. Moore*, 775.
2. **VOLUNTARY PAYMENT, WHAT IS NOT.** — Moneys realized from a foreclosure sale are not voluntary payments, although the mortgage foreclosed was voluntarily made. *Id.*
3. **APPLICATION OF PAYMENT REALIZED BY A JUDICIAL SALE**, where the judgment included several distinct demands, must be among such demands *pro rata*, and the creditor has no right to elect to appropriate such payment to the satisfaction of one of such demands in preference to another. *Id.*
4. **APPROPRIATION OF.** — WHEN THERE IS A CONTINUOUS ACCOUNT, consisting of many items, if no appropriation of payments is made by either party, they will be applied according to the priority of time. The item of earliest date will be discharged, or so far satisfied as the first payment may extend, and in this order will every payment be appropriated. *Willis v. McIntyre*, 574.
5. **WHERE NEITHER PARTY MAKES APPROPRIATION OF PAYMENTS**, UNTIL the rights of third persons holding under the debtor are such as might be enforced against him, the creditor cannot thereafter so appropriate payments as to affect such rights, if, by a different appropriation, they can be protected. *Id.*
6. **RIGHT OF DEBTOR TO HAVE PAYMENTS MADE ON ACCOUNT APPROPRIATED** to specific items will be denied, when this becomes necessary for the protection of one having equities against the debtor, such as would authorize against him a decree for the specific performance of a verbal gift of land. *Id.*
7. **USURIOUS LOAN — SUBSEQUENT SECURITY — APPLICATION OF PAYMENTS.** — Where loan is originally usurious, the plea and proof of usury applies to every subsequent security, and when the proof of usury is sufficient, the court will apply all payments of interest upon such loan as a payment *pro tanto* of the principal. *Knox v. Williams*, 220.

PERSONAL INJURIES.

See DAMAGES, 3; HIGHWAYS, 1-6.

PERSONAL PROPERTY.

1. **AT COMMON LAW, FINDER OF LOST PROPERTY HAS VALID CLAIM THERETO** against all the world except the true owner, and was bound to hold it for the owner, and was liable for misdelivery. This rule is modified by the provisions of the Oregon Code, secs. 3707-3711. *Sovern v. Yoran*, 293.
2. **STRICTLY SPEAKING, IT IS ONLY MONEY OR GOODS WHICH HAVE BEEN LOST** that can be said to be found. And lost property is that which the owner has involuntarily parted with, and not property which he has intentionally concealed for safe-keeping in the place where found. *Id.*
3. **MONEY OR GOODS, WHEN FOUND, ALTHOUGH OWNER IS UNKNOWN, WHICH HAS BEEN HIDDEN** in the earth by him for safe-keeping, is not property of which he has involuntarily parted with the possession, or lost property, to which the provisions of the Oregon statute as to lost property (Code, secs. 3707-3711) are applicable; and in such case, if the finder undertakes to treat or deal with it as lost property, his acts thereby will not impair the title of the true owner, or defeat his right to recover it. *Id.*
4. **WHERE ONE FINDS MONEY HID** in the earth, and the surroundings evidence that it was intentionally deposited in the place found for safe-keeping, but the finder, not knowing to whom it belonged, and there being no marks on it, or other indication by which the owner could be known, treats it as subject to the provisions of the statute as to lost property, and acting in good faith, pursuant to the statute, delivers it as therein prescribed, he is not liable for a conversion of the money. *Id.*

PLEADING AND PRACTICE.

1. **IN AN ACTION ON GUARANTY CONTRACT**, where the petition contains sufficient allegations of the purpose and intent of the parties in entering into the contract, it should not contain letters from the guarantor written before and after the execution of the guaranty. Such letters will be stricken out on motion, though admissible in evidence to show the circumstances under which the agreement was executed, as well as to aid in its construction. *Coquillard v. Hovey*, 134.
2. **TRANSCRIPT ON APPEAL. — IMMATERIAL MATTERS**, as copy of summons, and the return thereof, or other pleadings or matter not relied upon and not objected to, should not be included in the transcript, and where unnecessary matters are inserted therein, the costs of the same will be taxed to the party at fault, if the proper motion is made. *Winkler v. Roeder*, 155.
3. **WHERE ANSWER IS A GENERAL DENIAL**, and the only issue is the truth of the allegations of the petition, an offer by defendant to introduce affirmative proof on cross-examination is properly refused. *Id.*
4. **TRIAL COURTS SHOULD NOT INSTRUCT JURIES BY READING TO THEM** an opinion of the court in another case. If they desire to adopt such opinion as the law of the case, they should copy from it the portions that are applicable, and deliver them as their own opinion of the law. *Stewart v. Hunter*, 267.
5. **STATUTE OF LIMITATIONS — AMENDED DECLARATION. —** Where separate causes of action are set up in separate counts, and defendant pleads the statute to the whole declaration, plaintiff is entitled to recover if

one of his causes of action is not within the bar; and where the original declaration counts upon the negligence of the engineer, and the amended declaration also alleges separately and in addition the negligence of the flagman, which latter, if a new cause of action, might have come within the statutory bar; the defendant to avail himself of such bar must plead separately to that portion of the declaration which has reference to the negligence of the flagman. *Pennsylvania Co. v. Sloan*, 337.

4. **ACTION FOR CONVERSION.** — GENERAL RULE IS, THAT ANYTHING WHICH TENDS TO CONTROVERT directly the allegations in the complaint may be shown under the general denial. And where the complaint in an action for the conversion of personal property simply alleges title in the plaintiff, without stating how he acquired it, the defendant may show, under a general denial, that the sale under which the plaintiff claims title was void, so as to pass no title, by reason of fraud, and his rescission of the sale and retaking of the property. *Johnson v. Oswald*, 698.

See EQUITY, 9-11.

PRESUMPTIONS.

See CRIMINAL LAW, 16; ELECTIONS, 8.

PRINCIPALS.

See CONSPIRACY, 1; INDICTMENT, 1, 4.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

QUO WARRANTO.

- IN QUO WARRANTO PROCEEDING AGAINST CORPORATION** itself, for misuser or non-user of its corporate franchises, it is the only necessary party defendant in the case. But if judgment of ouster is rendered, or the charter vacated or set aside, the rights of all parties against the defendant will be protected. *State ex rel. Attorney-General v. Atchison etc. R. R. Co.*, 165.

RAILROAD COMPANIES.

1. **PASSENGERS ARE NOT REQUIRED TO KNOW** the rules and regulations made by the directors of the company for the control of the actions of its agents and the management of its affairs. *Hufford v. Grand Rapids etc. R. R. Co.*, 859.
2. **COMPANY MAY PRESCRIBE RULE REQUIRING ALL PERSONS BEFORE TAKING** PASSAGE on its passenger trains to procure tickets, and to exhibit them to the conductor at all proper times to entitle them to ride, and in default thereof to pay an additional sum, when it has furnished the necessary conveniences and facilities to travelers for procuring tickets. *Pool v. Northern Pacific R. R. Co.*, 289.
3. **IF COMPANY HAS FAILED OR NEGLECTED TO FURNISH TRAVELER OPPORTUNITY** to procure a ticket, and he applies for passage or enters its passenger train without having such ticket, but offers to pay the usual fare, the company cannot lawfully reject or eject him. *Id.*
4. **ANY RULE OR REGULATION WHICH COMPANY HAS RIGHT TO MAKE** for its own convenience, or the management of the business, and which the public are bound to obey, must be reasonable, and the company is bound

to furnish all the conveniences, opportunity, and means necessary to comply with it. Unless it does this, the rule is unreasonable. *Id.*

5. **ENGINEER ACTS WITHOUT THE SCOPE OF HIS AUTHORITY IN INVITING A PERSON TO RIDE ON THE ENGINE**, and if injury is suffered by such person without further fault on the part of the engineer or other servants of the company, it is not liable. *Chicago etc. R'y Co. v. West*, 380.
6. **ENGINEER MUST USE REASONABLE CARE IN PUTTING PERSON OFF ENGINE**; it is negligent conduct in engineer, for which his employer is answerable, to direct child only seven years old to get off engine while in motion, although such child was wrongfully there. *Id.*
7. **BAGGAGE-MASTER HAS NO AUTHORITY TO GRANT PERMISSION TO PERSONS TO RIDE ON THE CARS OF A RAILWAY TRAIN** which is in charge of another person at the time. The granting of such permission is not within the scope of his employment, and cannot affect the rights or obligations of the company by which he is employed, especially where the permission is in direct violation of its rules and regulations. *Reary v. Louisville, New Orleans, and Texas Railway Company*, 497.
8. **RELATION OF CARRIER AND PASSENGER DOES NOT ARISE BETWEEN RAILWAY COMPANY AND CHILD**, who, without permission from the person in charge of a train, enters a car for the purpose of taking a ride while the cars were being pulled back and forth at a railway station, with the intention of removing them from the track on which they had entered the station, and forming them into a train to be used next day. *Id.*
9. **RAILWAY COMPANY DOES NOT OWE SAME DEGREE OF CARE TO MERE STRANGERS** unlawfully upon its premises that it owes to passengers conveyed by it. To such strangers it is liable only for injuries resulting from its negligent or tortious acts. *Id.*
10. **ONE WHO IN PANIC LEAPS FROM RAILWAY CAR WHILE IN MOTION**, and is injured, cannot recover therefor in an action against the company, where such panic arose from causes with which it had no connection, and in which it had no agency. *Id.*
11. **LIABILITY OF COMPANY FOR ACTS OF PORTER OF PALACE CAR COMPANY**. — The porter of a Pullman palace car must be regarded as the servant of the railroad company of whose train such car is a part, in all matters pertaining to the safety of passengers whom it undertakes to carry over its line, and the company is liable for injury received by one of its passengers at the hands of such porter, where such passenger was not a trespasser upon the palace car at the time the injury was inflicted. *Williams v. Pullman Palace Car Company*, 538.
12. **COMPANY IS LIABLE FOR WANTON AND MALICIOUS ASSAULT ON PASSENGER**, made by one of its servants. *Id.*
13. **PASSENGER ON RAILWAY TRAIN IS NOT TRESPASSER ON PALACE CAR** which he enters for the purpose of asking permission to wash his hands. *Id.*
14. **LIABILITY OF LESSOR OF RAILROAD DOES NOT PREVENT LESSEE FROM BEING ALSO LIABLE FOR NEGLIGENCE** of its servants or agents. *Pennsylvania Co. v. Sloan*, 337.
15. **RIGHT OF RECOVERY FOR DEFENDANT'S NEGLIGENCE OR CARELESSNESS IS SUFFICIENTLY SET FORTH IN INSTRUCTION**, that "if the jury believe from the evidence that a flagman of the defendant improperly and inopportunately signaled," etc., where it also appears that the words "carelessly" and "negligently" were in the declaration, and a preceding instruction had called attention to the case of one person being put in

peril by the "negligence and misconduct" of another, and had also directed inquiry as to whether "the negligence of the defendant" had caused the alleged injury. *Id.*

16. **FLAGMAN OF RAILROAD COMPANY IS GUILTY OF NEGLIGENCE IN PERFORMANCE OF HIS DUTY**, where plaintiff is injured in crossing a track with his team in consequence of being signaled to come on when a train, unseen by him but which the flagman was bound to observe, was moving nearer and directly towards the team. *Id.*
17. **ONE STANDING UPON OR CROSSING RAILROAD TRACK TO BOARD MOVING TRAIN WHICH HAS LEFT STATION** is not in a position that makes the railroad company a guarantor of his safety, or exempts him from the obligation of using proper care for his self-protection, although passengers crossing the track at a station, to board or leave a train halted for that purpose, are not held to the exercise of the same care and vigilance that are ordinarily exacted from persons crossing railroad tracks; but are authorized to assume that the company will so regulate its trains that they will be safe from harm on the track which they are thus invited and required to cross. *Weeks v. New Orleans, Spanish Fort, and Lake Railroad Company*, 560.
18. **ATTEMPT TO BOARD MOVING RAILROAD TRAIN IS SUCH CONTRIBUTORY NEGLIGENCE** as will bar a recovery for injuries received in making such attempt. *Id.*
19. **ONE WHO STANDS ON RAILROAD TRACK IN FULL VIEW OF APPROACHING TRAIN**, which rings its bell and blows its whistle, without using his senses to guard against the danger to which he is exposed, being absorbed in an effort to board a moving train, is guilty of such contributory negligence as will bar a recovery. *Id.*
20. **ADOPTION OF NEW APPLIANCES.** — It is not the duty of a railroad company to discard reasonably safe machinery, and to adopt a new device for the safety of its employees, until by its general and continued use, or otherwise, its superiority has been established. *Gulf, Colorado, and Santa Fe Railway Company v. Walker*, 582.
21. **ADMISSIBILITY OF EVIDENCE AS TO NEW APPLIANCES TO SECURE SAFETY OF PERSONS ON RAILROAD TRACK.** — A boy while walking along a railroad track, which was laid in a public street, where pedestrians were accustomed to pass, had his foot caught between the rails of a switch, and was run over by a train of the company. In an action against the company to recover damages for the injury thereby sustained, evidence that a simple appliance by which the danger of being thus caught and injured was obviated had been in use on a few railroads in a distant part of the country for four or five years is admissible, in connection with other evidence in the case, that at the place where the accident occurred there were no sidewalks, that no safeguards were used by the defendant, and that without some guard the track was dangerous to brakemen and also to pedestrians passing over it. *Id.*
22. **COMPANY IS BOUND TO USE A DEGREE OF CAUTION CORRESPONDING** to the danger of operating its trains over the street of a city, when, by reason of the absence of sidewalks, persons might be expected to walk along and across the tracks. *Id.*
23. **ALTHOUGH IT MIGHT NOT BE STATUTORY DUTY OF RAILROAD COMPANY TO SIGNAL** the approach of a train as required at a public crossing, at a point where it permits the user by the public of a path crossing its track, yet the failure to do so might, in view of the facts, constitute negligence. *Houston etc. R'y Co. v. Boozer*, 615.

24. **STAKING OF CARS ACROSS HIGHWAY IN THE RAILROAD COMPANY'S YARD IS NOT AN UNLAWFUL ACT**, nor is it negligence *per se*. *Kelly v. Michigan Cent. R. R. Co.*, 876.
25. **HIGHWAY-CROSSINGS.** — Right of public in a highway crossing a railroad is simply a right of passage across the railroad. The highway-crossing is for the purpose of passage from one side of the railroad to the other, and any other use thereof, whether between the tracks or between the rails, is unwarranted. *Id.*
26. **TRESPASSER ON TRACK.** — One entering upon or traveling along the right of way of a railroad company is a trespasser, and does not cease to be such when he has reached a point where such right of way is intersected by a public street; and the company owes him no higher care or duty at such intersection than at other points along its railroad. He therefore cannot recover for injuries sustained at such intersection from a car which is being staked along the track in such right of way. *Id.*
27. **RAILROAD TRACK ITSELF IS WARNING OF DANGER** to all who go upon it, and a person about to cross is bound to look and listen, if by so doing he can discover the proximity of a moving train, and the omission to do so is an omission of ordinary care, which will prevent his recovering for an injury which might have been avoided if he had used his faculties of sight and hearing. Such conduct is of itself negligence. *Mynning v. Detroit etc. R. R. Co.*, 804.
28. **PRESUMPTION OF LAW IS, THAT PERSON KILLED AT CROSSING DID STOP** and look and listen, and such presumption will prevail in the absence of direct testimony on the subject; but where there is affirmative, direct, and creditable testimony to the contrary, the presumption is rebutted and displaced. *Id.*
29. **CONTRIBUTORY NEGLIGENCE — ACCIDENT AT CROSSING RESULTING IN DEATH.** — Testimony that the deceased was a man possessed of ordinary faculties; that he was acquainted with a certain railroad-crossing; that on a dark and stormy evening he walked at a rapid pace towards and upon the crossing, without checking his speed, or stopping, or looking, or listening, or taking any precaution whatever to ascertain whether a train was about to pass; that others, who were about to cross, with no better opportunities for observation, saw and heard the train; that he stepped upon the crossing, and was struck and killed by the train, — shows such contributory negligence on the part of the deceased as prevents a recovery by his administrator, and the trial judge should have directed a verdict for the defendant. *Id.*
30. **COMPANY IS LIABLE TO ITS SECTION-FOREMAN** for injuries received by him, where, having informed the company of the unsafe condition of the road-bed, he was furnished with no material to repair it, and afterwards the road was broken up by a passing train, and the foreman, while subsequently passing that part of the road in a hand-car, in the performance of his duties, in ignorance of the recent accident, and while exercising due care, sustained the injury complained of by reason of the broken road. *Gulf etc. R'y Co. v. Donnelly*, 608.
31. **NON-LIABILITY FOR INJURY TO EMPLOYEE OF ANOTHER COMPANY.** — The plaintiff was injured by reason of a defect in one of the defendant's freight-cars, but at the time of the injury was not in the defendant's service, but in that of another company then using the car in its own business. The car had been sent over the road of the latter company, which connects with that of the defendant, consigned to a

point in another state; but on its return it was transferred beyond the point of junction at which it should have been returned to the defendant, and was loaded with freight consigned to a distant point on such connecting road. The plaintiff was injured while attempting to ascend the ladder of the car, a round of which was defectively attached. Under this state of facts, the defendant owed the plaintiff no duty in respect to the condition of the car growing out of contract, or otherwise, and could not be held liable in this action for the injury so sustained by the plaintiff. *Sawyer v. Minneapolis and St. Louis R'y Co.*, 648.

32. CONSOLIDATION OF RAILROADS — CONSTRUCTION OF STATUTE. — The Nebraska statute, which provides when and how railroad companies may consolidate, authorizes the consolidation of two lines of railway only where the lines thus consolidated will form one continuous railroad. *State ex rel. Attorney-General v. Atchison & N. R. R. Co.*, 165.
33. ONE RAILROAD AIDING ANOTHER IN CONSTRUCTING ROAD — LEASING RAILROAD — CONSTRUCTION OF STATUTE. — Under the Nebraska statute, the authority of one company to aid another in the construction of its railroad is for the purpose of making connection between the two roads; and the right of any company to lease or purchase a railroad constructed by another company relates only to cases where the two lines would be continuous and connected. *Id.*
34. RAILROAD MAY NOT LEASE ITS ROAD TO ANOTHER COMPANY unless specially authorized by charter or aided by legislative authority, and in the latter case the exact statute relied on as granting such authority must be pointed out; nor may one railroad make a contract to receive and operate the road, franchises, and property of another corporation without similar authority. *Id.*
35. COMPANY IS GUILTY OF MISUSER AND NON-USER OF FRANCHISES, AND SUCH FRANCHISES ARE SUBJECT TO FORFEITURE, where it surrenders all its powers, rights, and franchises to another corporation by an unauthorized lease extending over a long period of time. *Id.*
36. CONSOLIDATION OF RAILROADS. — THE CONSTITUTION of Nebraska absolutely prohibits the consolidation of parallel and competing lines of railroad; the word "consolidate" being used in the sense of join or unite, and the prohibition against such joinder is a prohibition against leasing such roads. *Id.*
37. CORPORATION, ALTHOUGH ORGANIZED PRIOR TO ADOPTION OF CONSTITUTION, IS SUBJECT TO PROVISIO THEREIN restricting parallel and competing lines of road from consolidating or from leasing such roads, where such corporation was organized for the special purpose of building a competing line of road, and had no authority under the statute to make a lease, and was deprived of no rights by the constitutional provision. *Id.*
38. CONSTRUCTION OF CONSTITUTIONAL PROVISION. — Section 5, article 11, of the constitution of Nebraska, was intended to restrict the issue of stock and bonds by a railroad corporation to the actual consideration received. One of the objects of the provision was to enable all parties to know the actual cost of all railroads within the state, so that the legislature, in providing for taxing them and regulating the charges for transportation of persons and property, might be enabled to do so advisedly, and pass laws which should be just alike to the railroad companies, the public, and individuals. *Id.*

See CARRIERS.

RAPE.

See CRIMINAL LAW, 13.

RECEIVERS.

FOREIGN RECEIVER.—Where the parties to an action reside in one state, the court of that state has power to appoint a receiver to take possession of the property of the defendant in another state; but such court has no power to remove or cause to be removed personal property from another state, so as to bring it within the jurisdiction of the state in which the court sits which has appointed the receiver. *Straughan v. Hallwood*, 29.

RELIGIOUS SOCIETIES.

1. **GRATUITOUS PROMISE CANNOT BE ENFORCED BY ACTION**, however worthy the object intended to be promoted. *Presbyterian Church of Albany v. Cooper*, 767.
2. **SUBSCRIPTION WHEREBY THE SUBSCRIBERS AGREE TO PAY A CERTAIN SUM TO THE TRUSTEES OF A CHURCH, TO BE USED TO DISCHARGE A MORTGAGE THEREON**, reciting a nominal consideration, which in fact was not paid, is a mere gratuitous promise, not enforceable by action, unless the trustees assume some duty or obligation on their part, other than the duty to apply the money, if paid, to the object contemplated by the subscribers. *Id.*

See EVIDENCE, 11-13.

RESERVATIONS.

See DEEDS, 3.

RIPARIAN RIGHTS.

1. **TITLE TO SOIL UNDER WATER AND BEYOND LOW-WATER MARK** of a navigable stream or lake is in the state, and a deed of conveyance executed by the owner of the abutting shore, purporting to convey such soil, is wholly inoperative. *Lake Superior Land Company v. Emerson*, 679.
2. **ONLY RIGHTS WHICH RIPARIAN OWNER CAN HAVE BEYOND LOW-WATER MARK** are certain riparian rights incident to land bordering upon navigable water. Such rights exist *jure nature*, and cannot be severed and transferred apart from the abutting shore, so as to become rights in gross. *Id.*
3. **RIPARIAN RIGHTS INCIDENT OR APPURTENANT to no land cannot exist.** *Id.*

SABBATH-BREAKING.

See CRIMINAL LAW, 7.

SALE.

SALE OF JUDGMENT IMPLIES WARRANTY OF EXISTENCE OF DEBT evidenced by the judgment, at the time of the transfer, and if the judgment was not then in existence as a claim, the vendor will be bound to restore the price to the purchaser. *Johnson v. Boice*, 528.

See HOMESTEAD, 5.

SCHOOLS.

1. **THE CONSTITUTION OF ILLINOIS DECLARES AGAINST THE USE OF PUBLIC FUNDS TO AID SECTARIAN SCHOOLS**, independently of the question whether there is or is not a consideration furnished in return for the funds so used. *County of Cook v. Industrial School*, 386.
2. **SCHOOL IS SECTARIAN, AND COMES WITHIN CONSTITUTIONAL PROVISION THAT PUBLIC FUNDS SHALL NOT BE PAID OUT IN AID OF ANY SECTARIAN PURPOSE**, or in aid of any school, etc., controlled by any church, where such school is a corporation organized as an industrial school for girls, but does not lease or own any building, although its charter contemplates that it shall have a *situs*, nor otherwise comply with the provisions of its act of incorporation, but places all girls nominally committed to it under the sole charge, care, and control of two institutions controlled by a church, where they are taught, maintained, and clothed by them alone, and in which institutions the inmates, although not obliged to receive instructions in the Romish faith, are yet taught no other faith or creed; and in such case a suit to recover for tuition and clothing furnished girls so placed cannot be maintained against the county. *Id.*
3. **TO SHOW THAT A SCHOOL IS CONTROLLED BY A CHURCH, EVIDENCE IS ADMISSIBLE** that a judge of the superior court went to the place where an industrial school was alleged to be carried on, and was refused admittance unless he should first obtain a permit from a bishop or member of the Romish church, it appearing that such judge was authorized to commit girls to an industrial school, and that books containing copies of the warrants of commitments were required to be kept therein. *Id.*
4. **IMPEACHING COLLATERALLY THE ORGANIZATION OF DE FACTO CORPORATION — QUO WARRANTO.** — If an industrial school that has availed itself of the provisions of the statute of Illinois — providing for the payment of moneys to such schools — is guilty of the misuse or non-use of its powers, and brings suit against a county upon a contract which the latter can lawfully make, perhaps a defense cannot be maintained solely upon the ground that the school is violating its charter; the proper proceeding to test that question may be *quo warranto*. But if the contract sued on is a contract to pay money out of the public funds in aid of a sectarian purpose, it is absolutely void under the constitution. *Id.*
5. **CONSTITUTION CONTROLS IN PREFERENCE TO STATUTE**, where the statute directs a county board to pay money to an industrial school, and the constitution, in a self-executing provision, directs the county board not to pay money to such school when controlled by a church. *Id.*

SECONDARY EVIDENCE.

See ELECTIONS, 41.

SECURITY FOR COSTS.

See COSTS.

SEDUCTION.

See CRIMINAL LAW, 10-14.

SELF-DEFENSE.

See HOMICIDE, 8, 10-13, 18-21; INSTRUCTIONS, 4, 5.

SERVANTS.

See MASTER AND SERVANT.

SHERIFF.

HAS NO AUTHORITY IN TEXAS TO SERVE CAPIAS beyond the limits of his county. *Jones v. State*, 454.

See EXECUTIONS, 2.

SIDEWALKS.

See MUNICIPAL CORPORATIONS, 4-7.

SLEEPING-CAR COMPANY.

See CARRIERS, 1-3; RAILROAD COMPANIES, 11-13.

SPECIFIC PERFORMANCE.

1. DEFECT IN TITLE. — If a vendee has purchased land and received a conveyance of general warranty, he will not be required to pay all the purchase price, if the title is defective, or part of the land is claimed by other parties. Upon proof of the defect in the title, he will not be required to pay the purchase price until such defect is removed, or a proper abatement in such price is decreed, if he insists on having that part of the land for which a perfect title can be given. *Heavner v. Morgan*, 55.
2. DEFECT IN TITLE — ABATEMENT IN PRICE. — Where, under a bill for specific performance, it is questionable whether the vendor had title to part of the land he sold, the vendee claiming an abatement for the loss of land to which he cannot have title, the court will not fix the average price per acre of the entire tract sold as the rule of abatement, but will adopt as the measure of abatement such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract. *Id.*
3. DEFECT IN TITLE. — When, in a suit to enforce a vendor's lien, the answer resists payment on the ground that part of the land is claimed and held by certain parties by title paramount, unless such answer shows on its face that *prima facie* the title is defective, it is not sufficient; but if it does show this, the plaintiff cannot reply specifically, but must amend his bill, and make all such parties who set up such *bona fide* claims defendants to his bill, and show by his bill, if he can, that his title is clear and valid. If he does not intend to insist on title as against the defendants, or any of them, who are claiming his land, or part thereof, as shown by the answer, let him say so in his bill, and he need not make such parties defendants; but he will not be permitted to require defendant, who is the purchaser, to pay for any land to which the said third party appears to have had a good title, but which the court thinks has been lost by adverse possession, unless such party is a defendant to the suit. If the claim of such third party to the land sold to the vendee is based on such grounds as will put a reasonable man in just apprehension of losing his land, such claimant should be made defendant to the suit, that the rights of all parties may be protected. *Id.*

STATE.

See COSTS, 1-3.

STATUTE OF LIMITATIONS.

1. **WILL RUN IN FAVOR OF VILLAGES AND CITIES**, and will bar action on village warrant. *Arapahoe Village v. Albee*, 202.
2. **LEASE TO DEFENDANTS**. — In ejectment to recover a strip of inclosed land, the fact that defendant had leased from plaintiff's grantor a piece of uninclosed land adjacent to the disputed strip, for a long time prior to the bringing of said action, does not affect the right of the defendant under the statute of limitations, the intent being to lease only the uninclosed tract. *Tex v. Pflug*, 231.

STATUTES.

WHERE LEGISLATURE OF ONE STATE ADOPTS STATUTE OF ANOTHER STATE, the construction of which has been judicially determined in the latter, a presumption arises, to be considered in connection with other principles of construction, that the legislature intended to adopt the statute with that settled construction. *Nicollet National Bank v. City Bank*, 643.

See **APPEAL**, 7.

SUBSCRIPTIONS.

See **RELIGIOUS SOCIETIES**, 1, 2.

SUPPLEMENTAL BILL.

See **EQUITY**, 9-11.

SURETYSHIP.

1. **LIABILITY OF SURETY ON BOND WHERE PRIOR SIGNATURES OF CO-SURETIES ARE FORGERIES — INSTRUCTIONS**. — A surety who signs an obligation after the names of others admits without warranty the genuineness of those signatures, and if the principal's or the co-sureties' names be forged without his knowledge and without complicity of the holder, it is no defense to the surety that he believed such signatures were genuine; and an instruction or inference from the court to the jury that such surety was liable to suffer from a mistaken belief of the genuineness of such signatures is error. *Lombard v. Mayberry*, 234.
2. **INSTRUCTIONS AS TO PRINCIPAL'S COMPLICITY IN FRAUDULENT EXECUTION OF BOND**. — In an action against surety on bond where prior signatures of co-sureties are forged, it is error to charge the jury that if one D. "was found to be acting as agent for the plaintiff (being his attorney at law), and saw the defendant sign the bond, and handed him the pen with which he was to sign it and did sign it, then that the defendant was not legally bound by such bond," since such act in itself is not sufficient to predicate complicity of plaintiff or his attorney in the fraudulent execution of the bond, and is too remote to predicate any such conclusion thereon. *Id.*
3. **SURETY ON PROMISSORY NOTES WHO AGREES TO PAY THEM** as his own, and does so, in consideration of the conveyance to him by the maker of certain land encumbered by an unrecorded mortgage, of which the surety had no actual notice until after such payment, thereby assumes a new legal obligation, the payment of the notes before notice of the encumbrancer's equities forming a sufficient consideration for the deed. *Hanold v. Kays*, 835.

See **OFFICIAL BONDS**, 1, 2, 4-6.

TAXATION.

1. **GOODS BROUGHT FROM ONE STATE TO ANOTHER BECOME LAWFUL OBJECTS OF TAXATION** in the latter state the moment they reach their destination, and are there kept, ready and offered for sale, at any point within the place of destination; and it is immaterial that they remain unloaded on the vessel that brought them, without being consigned to any particular point or to any specially authorized agent. *Pittsburgh & S. Coal Co. v. Bates*, 519.
2. **DESIGNATION OF NEWSPAPER FOR PUBLICATION OF DELINQUENT TAX LIST**, named in a resolution of the board of county commissioners the "Enterprise," sufficiently designates the "Glencoe Enterprise," there being no other newspaper published in the county bearing that name, and being in common speech spoken of as the "Enterprise." *Knight v. Alexander*, 675.
3. **DESCRIPTION IN PUBLISHED DELINQUENT TAX LIST** as follows: "N $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of NW $\frac{1}{4}$ section 23, township 114, range 30, 160 acres," is not a sufficient description of the north half of the northeast quarter, the southeast quarter of the northeast quarter, and the northeast quarter of the northwest quarter of that section. In such a publication a description which is in fact erroneous, and which is calculated to mislead, is legally insufficient as constructive notice. *Id.*

TIME.

1. **LAW DOES NOT IN GENERAL REGARD FRACTIONS OF DAY**, except in cases where the hour itself is material, as where priority of judgments and the like is in question. *Mitchell v. Schoonover*, 282.

TOWNSHIP.

See HIGHWAYS, 4.

TRESPASS.

1. **PERSON HAS LICENSE TO ENTER PUBLIC OFFICE OF ANOTHER** to transact business with the latter, who may refuse to transact business with him, and may order him from the office, and eject him in a reasonable manner, if he refuses to go, using sufficient force to meet any offered resistance. *Breitenbach v. Trowbridge*, 829.
2. **IF ONE IS FORBIDDEN TO ENTER OFFICE OF ANOTHER**, he is a trespasser, if he persists in entering. *Id.*
3. **PERSON HAS RIGHT, IN HIS PRIVATE BUSINESS, TO CONTROL IT**, and may select such persons as he chooses with whom to transact it, and can prevent whom he pleases from entering his office; and when a person, under implied license, has entered, he may request him to depart, and thereafter he has no legal right to remain. *Id.*
4. **PERSON'S PRIVATE BUSINESS OFFICE CANNOT BE MADE**, against his will, free to all to enter and remain, even upon proper business, and such person can admit or reject whom he pleases. It is his own business, and the public have no rights therein against his wishes. *Id.*
5. **IN CIVIL ACTION FOR DAMAGES FOR ASSAULT AND BATTERY, ADMISSIONS, MADE** by the defendant in conversation with the police justice before whom he was tried on the same charge, are admissible in evidence, but what the police justice said to him is incompetent. *Id.*

6. IN ACTION FOR RECOVERY OF DAMAGES FOR BEING EJECTED FROM OFFICE OF DEFENDANT, where the plaintiff went to tender money due him, evidence of a prior offer of the money to an agent of the defendant, and that he refused it and sent the plaintiff to the defendant, is a legitimate part of the transaction, and the agent's statements are admissible in evidence. *Id.*
7. EVIDENCE IS ADMISSIBLE, IN CIVIL ACTION FOR ASSAULT AND BATTERY, that the defendant called the plaintiff a "d——d police-court shyster," on the former's trial on a criminal charge arising out of the same transaction, as showing the *animus* of the defendant towards the plaintiff, but is incompetent for the purpose of showing malice at the time of the assault. *Id.*

See EXECUTIONS, 2.

TRIAL.

1. UPON MOTION FOR CHANGE OF VENUE ON GROUND OF PREJUDICE, EVIDENCE is admissible other than that of the supporting affiants, and witnesses may be examined on both sides as to the existence or non-existence of "prejudice" in the county. Article 583 of the Code of Criminal Procedure of Texas does not, in such cases, restrict the matters to be investigated solely to the credibility and means of knowledge of the defendant's compurgators in the application. *Meuly v. State*, 477.
2. IT IS DUTY OF TRIAL JUDGE, WHEN REQUESTED, BEFORE SUBMISSION OF CASE TO JURY, to decide, as a preliminary question of law, whether there is any evidence on which the jury could properly find a verdict for the party on whom the burden of proof lies, and if there is not, he ought to withdraw the case from the jury. *Mynning v. Detroit etc. R. R. Co.*, 804.
3. INSTRUCTION IS ERRONEOUS where there is no evidence in the case to which it is applicable; it is also erroneous where, although it states a correct principle of law, yet the language used is inexact, obscure, and therefore misleading. *Lombard v. Mayberry*, 234.
4. VERDICT ARRIVED AT BY EACH JUROR MARKING A SUM AS DAMAGES, the total of which constitutes a dividend, taking their own number as a divisor, and the quotient as their verdict, without prior agreement to be bound by it, will not be disturbed. *Village of Ponca v. Crawford*, 144.

USAGE AND CUSTOM.

USAGE AND CUSTOM CANNOT BE PROVED TO CONTRAVENE A RULE OF LAW, or to alter or contradict the express or implied terms of a contract free from ambiguity, nor to make the legal rights or liabilities of the parties to a contract other than they are by the terms thereof. *Hopper v. Sage*, 371.

USURY.

See PAYMENT, 7.

VARIANCE.

See INDICTMENT, 5.

VENDOR AND VENDEE.

1. EVIDENCE. — INSTRUMENT SET FORTH IN COMPLAINT, ACKNOWLEDGING the receipt of a sum of money in part payment of a certain described lot,

is not a contract for the sale or purchase of land, but a receipt only, subject to be explained and supplemented by evidence *alimunde*. *McKinney v. Harvie*, 640.

2. EVIDENCE IN THE PARTICULAR CASE SHOWING that the plaintiff acted as the agent of another person in a negotiation for the purchase of land. *Id.*
3. RECOVERY BACK OF PURCHASE-MONEY PAID BY PURCHASER. — Purchaser of land under a parol contract for the sale thereof, who repudiates the contract, and refuses to fulfill, is not entitled to recover an installment of purchase-money previously paid by him, if the vendor is willing, and offers to perform on his part, notwithstanding the contract is within the statute of frauds. *Id.*
4. MISTAKE IN DESCRIPTION OF LAND. — Where a bond for title incorrectly describes the land to be conveyed, the purchaser is entitled, in a proper case, to a correction of the bond, and the mistake may be established by parol evidence. *Goff v. Jones*, 619.
5. CANCELLATION OF DEED FOR FRAUDULENT REPRESENTATIONS BY VENDEE. — Where parties to a deed stand on an equal footing, expressions of opinion as to the value of the property, whether true or false, will not constitute fraud. But if the purchaser resides near the property, and has full knowledge of its situation and approximate value, and the owner resides in another state, without any knowledge on the subject, opinions as to value by the purchaser, which he knows to be much below the real value of the property, and statements made by him that the owner's title has been abrogated by tax sales, will be sufficient, where the property was purchased for a grossly inadequate consideration, to set aside and cancel the deed. *Morgan v. Dinges*, 121.
6. CANCELLATION OF DEED FOR MISREPRESENTATIONS BY VENDEE. — Where the purchaser does any act, or makes any declaration, with the intention of misleading the seller, and preventing him from ascertaining the real situation of the property, and at the same time conceals from him a material fact upon which he relies, and of which the vendee has knowledge, the latter is guilty of fraudulent deception, for which the deed may be canceled. *Id.*

See SPECIFIC PERFORMANCE.

VENUE.

See TRIAL, 1.

VERDICT.

See TRIAL, 4.

VOTERS.

See ELECTIONS, 23, 25, 30, 36-40.

WARRANT.

See EXTRADITION, 1-4.

WATERS.

1. "WATERCOURSE," IN LEGAL SENSE OF TERM, DOES NOT NECESSARILY CONSIST merely of the stream as it flows within the banks which form the channel in ordinary stages of water; and when, in times of ordinary

high water, the stream, extending beyond its banks, is accustomed to flow down over the adjacent lowlands in a broader but still definable stream, it has still the character of a "watercourse," and the law relating to watercourses is applicable, rather than that relating to mere surface water. *Byrne v. Minneapolis etc. Ry Co.*, 668.

2. **RAVINE OR GULLY WHICH IS SIMPLY OUTLET FOR SURFACE WATER** at certain seasons of the year, having no defined bed or channel, with banks and sides, nor permanent source of supply, and no living or spring water ever coursing through it, cannot be termed a natural watercourse, and is not therefore governed by the well-settled rules applying to natural streams. *Gregory v. Bush*, 797.
3. **EASEMENT MAY BE ACQUIRED BY PRESCRIPTION**, BY WHICH the water-collecting upon the lands of one person must be allowed to overflow the lands of an adjacent proprietor. *Id.*
4. **OWNER OF LAND HAS RIGHT, IN INTEREST OF GOOD HUSBANDRY**, and in the improvement and tillage of his farm, in good faith, to fill up stagnant pools, sag-holes, and basins on his land, so that no water will accumulate or remain in them, even if the water arising from rain-fall or melting snows should thereby, in natural processes, find its way to the land of an adjoining owner, and incidentally increase the flow thereon; but he cannot, by artificial drains or ditches, collect the waters of such low places and cast them in a body upon the proprietor below, to his injury. *Id.*
5. **WATERCOURSES — ACRETION TO ISLAND BY AVULSION.** — The owner of an island in a river becomes the owner of an accretion formed on such island by an avulsion attached to the lower end of such island from the sudden washing away of the upper end thereof, and may maintain trespass against a stranger for the injury done in cutting timber on the land thus formed. *Wiggenhorn v. Kountz*, 150.
6. **WATERCOURSES.** — WHERE MAINLAND AND ISLAND in a non-navigable river have been separately surveyed, and sold to different parties, the grantees of the mainland do not by their grant acquire the island; they, at most, can claim only to the center or thread of the stream between the shore and the island. *Id.*
7. **WATERCOURSES.** — WHERE GRANT OF MAINLAND AND ISLAND in a non-navigable river are separate and distinct, neither grantee can claim beyond the calls of his entry or patent, the rule being that where there is a clear reservation of islands in a grant of mainland adjacent to a river, either expressly or by necessary implication, such islands do not pass to the grantee, and the *filum aque* which bounds the grant is the center thread of the stream between the shore and the island. In such case, two *fila aque* are established, one on each side of the island. *Id.*
8. **ICE BELONGS TO THE OWNER OF THE SOIL** under the water on which it forms; and this rule is not confined to ponds forming or being entirely upon a person's premises, but his riparian ownership of the bed of the stream will carry with it the right to the ice forming on the surface of such stream as far as his riparian right to the soil extends. *Bigelow v. Shaw*, 902.
9. **ICE.** — **MILL-OWNER HAVING THE RIGHT TO THE FLOW OF CERTAIN WATER OVER THE LANDS OF ANOTHER** has no right to the ice formed on such water, if its removal will not decrease the capacity of the mill-pond to furnish water-power to his mill, and is no injury to such water-power. *Id.*

See DAMAGES, 5; RIPARIAN RIGHTS.

WIFE.

See HOMESTEAD, 2.

WILLS.

1. **REVOCATION OF WILL MAY BE ESTABLISHED BY PROVING A SUBSEQUENT WILL** containing a clause revoking all former wills, although the later will has been lost or destroyed, and no part of its contents other than the clause of revocation can be proved. *In re Cunningham*, 648.
2. **EVIDENCE TO OPPOSE THE PROBATE OF A WILL** may consist of proof of a revocatory clause in a later will which has been lost or destroyed, and can never be established as a will so as to be admitted to probate. *Id.*
3. **PRECATORY REQUESTS.** — **IF IN A WILL THE TESTATOR GIVES THE WHOLE** of his property to his wife, naming her as executrix, and then proceeds as follows: "If she find it always convenient to pay to my sister, C. B., the sum of three hundred dollars a year, and also to give my brother, E. W., during his life, the interest on ten thousand dollars per year, I wish it to be done," — the executrix is not at liberty, as her caprice may suggest, to pay or withhold those sums, but must pay them if her financial circumstances are such as to make it convenient for her so to do. *Phillips v. Phillips*, 737.

WITNESSES.

1. **IN IMPEACHING WITNESSES**, the following rules apply: first, the inquiry must be restricted to the general character of the party sought to be impeached; second, that the impeaching witnesses must speak from general reputation, and not from their private opinions, as to whether the character of the impeached witness is good or bad for truth, or as to whether the general reputation of the impeached witness is such as to entitle him to credit on oath. *Griffin v. State*, 460.
2. **ANSWER TENDING TO CRIMINATE — WAIVER OF PRIVILEGE.** — Where witness in his deposition testifies in chief to execution of certain notes, he does not thereby waive his privilege of refusing to answer on cross-examination, on the ground that his answer might tend to criminate him, as to whether the notes were respectively in the same condition at the time he was testifying as they were when signed and delivered; and it is error in the court in such case to strike out such deposition on the ground that witness had, by so answering in chief, waived his privilege. *Lombard v. Mayberry*, 234.

See CONSTITUTIONAL LAW, 3; HUSBAND AND WIFE, 4.

WRONGFUL ATTACHMENT.

See ATTACHMENT, 19.

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